GETTING FROM A DAMAGES VERDICT TO JUDGMENT

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I. Introduction

Say you have obtained a favorable jury verdict, and the judge asks you to prepare a proposed judgment. The Texas Rules of Civil Procedure give you the broad parameters: rendition of judgment on a jury verdict is a ministerial duty; 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"; and the judgment shall contain the "full names of the parties, as stated in the pleadings, for and against whom the judgment is rendered." *See, e.g.*, TEX. R. CIV. P. 300, 301, 306. But many of the details of judgment formation come from statutory and common-law requirements and customs.

This paper is meant as a compilation—or checklist—of many of those requirements and customs. While we do not cover every question that could possibly arise, we do address some of the most common ones—like election of remedies, pre- and post-judgment interest, attorneys' fees, and costs.[1]

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II. Ascertaining the proper damages amounts to be awarded

The first step in forming a judgment from a jury's verdict is to ascertain the amount of damages that is legally recoverable. *See* TEX. R. CIV. P. 301. This involves a number of considerations:

A. Election of Remedies

Alternative recoveries in a jury verdict presents one of the most important judgment formation issues. There is an excellent discussion of this issue by Chris Dove in *Carefully Elect Your Remedies, and Preserve the Right to Elect Alternatives*, 2018 TXCLE Advanced Civil Appellate Practice, *available at* 2018 WL 6711775 (2018). The key questions are set forth below.

Is an election in the judgment required? A judgment cannot award duplicative relief, or a double recovery, in violation of the one-satisfaction rule. *Tony Gullo Motors I, L.P. 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, then that party is entitled to recover on the theory entitling it to the greatest or most favorable relief. *See* TEX. R. CIV. P. 301; *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995); *Boyce Iron Works, Inc. v. Sw. Bell Tel. Co.*, 747 S.W.2d 785, 787 (Tex. 1988); *see also Am. Rice, Inc. v. Prods. Rice Mill, Inc.*, 518 F.3d 321, 335–36 (5th Cir. 2008). The party must elect the remedy or combination of remedies that provides the greatest relief, without creating a double-recovery, and without mixing and matching remedies that are available only under particular causes of action. *Tony Gullo Motors*, 212 S.W.3d at 304.

An election in the judgment may not be necessary if only a single recovery of damages is awarded, even if it is against two defendants on different theories of liability. *See, e.g., Direct Value, L.L.C. v. Stock Bldg. Supply, L.L.C.*, 388 S.W.3d 386, 394–95 (Tex. App.—Amarillo 2012, no pet.); *Hatfield v. Solomon*, 316 S.W.3d 50, 59-60 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

When must the election be made? The prevailing party is entitled to make an 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. Courts have held that parties may "re-elect" their remedies after disposition in the appellate courts, including for the first time in a motion for rehearing. *See, e.g.*, *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 603 (Tex. 2008) (citing *Boyce Iron Works*, 747 S.W.2d at 787); *Bruce v. Cauthen*, 515 S.W.3d 495, 517 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (accepting appellee's election of remedies offered in a motion for rehearing).

What happens if the prevailing party fails to make an election? Rule 301 requires the court to draft a judgment that will "give the party all the relief to which he may be entitled." So, if the prevailing party fails to make the election, the trial court should render a judgment utilizing the findings affording the greater recovery. *See Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002); *Main Place Custom Homes,*

Inc. v. Honaker, 192 S.W.3d 604, 613 (Tex. App.—Fort Worth 2006, pet. denied).

If an election is made, what is required to preserve the prevailing party's right to recover under alternative theories? Based on the above, arguably nothing is required to preserve the right to recover alternative theories. Nevertheless, prudent practitioners will follow the language in *Boyce Iron Works* and incorporate the jury's findings or the court's findings of fact and conclusions of law in the judgment for all purposes. *See Boyce Iron Works*, 747 S.W.2d at 787; *Oak Park Townhouses v. Brazosport Bank of Tex., N.A.*, 851 S.W.2d 189, 190 (Tex. 1993) ("By incorporating the jury's findings in the court's judgment, Boyce [in *Boyce Iron Works*] did everything it could to preserve the right to recovery under the alternative theory.").

Should the judgment specify the prevailing party's alternative recoveries? Alternative recoveries need not be in the judgment for preservation. But including them may allow and encourage the appellate court to render on the alternative claim in the event that it sets aside the claim upon which the judgment was granted. *See Cincinnatti Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996) (stating that courts of appeals should consider all grounds the trial court rules on and the movant preserves for appellate review that are necessary for final disposition of the appeal); *Cotter & Sons, Inc. v. BJ Corp.,* 549 S.W.3d 715, 729 (Tex. App.—San Antonio 2017, pet. dism'd) (noting that because judgment did not award any damages for quantum meruit "in the alternative," court could not render judgment on that ground after reversing breach-of-contract recovery). *But see* Chris Dove, *supra* (recommending against the practice of including alternative recoveries in the judgment "for three reasons: it is unnecessary, it can be pointless, and it often makes the judgment hard to read.")

B. Apportionment (joint & several, multiple defendants)
The judgment should clearly apportion damage awards among the individual parties, including awards of actual and punitive damages and prejudgment interest. The judgment should specifically say whether the awards are several or joint and several. *But see TVMAX Holdings, Inc. v. Spring Indep. Sch. Dist.*, No. 01-14-00304-CV, 2015 WL 1967596, at *7 (Tex. App.—Houston [1st Dist.] Apr. 30, 2015, no pet.) (no error when judgment did not apportion damages where defendants were jointly and severally liable).

An award of exemplary damages cannot be joint and several: "In any action in which there are two or more defendants, an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant." TEX. CIV. PRAC. & REM. CODE § 41.006; *see Carlton Energy Grp., LLC v. Phillips,* 369 S.W.3d 433, 465 (Tex. App.—Houston [1st Dist.] 2012) (rejecting argument that alter ego finding trumps 41.006's plain language), *aff'd in part, rev'd in part,* 475 S.W.3d 265 (Tex. 2015); *Computek Computer & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217, 223–24 (Tex. App.—Dallas 2005, no pet.) ("By its plain terms, section 41.006 provides that there is no joint and several liability for exemplary damages.").

C. Proportionate Responsibility and Settlement Credits
Chapter 33 of the 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. Although this paper will not attempt to examine 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 reduction in net liability. *See* TEX. CIV. PRAC. & REM. CODE § 33.012(b), (c).

Two relatively recent Texas Supreme Court opinions address the determination of settlement credits:

- *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101 (Tex. 2018) (holding that, under one-satisfaction rule, defendants were entitled to a settlement credit when the record showed that all allegations arose from the same injury); and

- *Regent Care Ctr. of San Antonio, L.P. v. Detrick*, 610 S.W3d 830, 834-36 (Tex. 2020) (settlement credit was properly applied before TMLA's $250,000 cap on liability for noneconomic damages).

D. Offsets for successful counterclaims
If the defendant prevails in a counterclaim against the plaintiff in an amount that exceeds any recovery by the plaintiff, then the judgment must award the difference to the defendant. TEX. R. CIV. P. 302; *see also* TEX. R. CIV. P. 97(c) ("A counterclaim may or may not diminish or defeat the recovery sought by the opposing party.").

"Mutual judgments generally are subject to offset." *Galvan v. Garcia*, No. 14-16-00162-CV, 2018 WL 3580574, at *4 (Tex. App.—Houston [14th Dist.] July 26, 2018, pet. denied) (mem. op.) (*citing Bonham State Bank v. Beadle*, 907 S.W.2d 465, 470 (Tex. 1995)); *see also In re Henry*, 388 S.W.3d 719, 729 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (ordering that breach-of-contract awards in favor of two different parties

be offset against each other, resulting in final judgment awarding only net recovery); *Wood v. PennTex Res. LP*, No. H-06-2198, 2008 WL 2609319, at *11–12 (S.D. Tex. June 27, 2008) (similar in arbitration award).

E. Application of Statutory Caps

In calculating the amount of damages the judgment will award, consider whether a statutory damages cap applies. *See* TEX. CIV. PRAC. & REM. CODE §§ 41.008 (establishing a general ceiling on punitive damages), 74.301–.303 (limiting noneconomic and exemplary damages for health care liability claims).

Chapter 41 of the Civil Practice and Remedies Code is important on this front. Section 41.006 specifies that in multi-defendant cases, any award of exemplary damages must be specific as to each defendant. *Id.* § 41.006. And under § 41.008, exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1) two times the amount of economic damages, plus an amount equal to any noneconomic damages found by the fact-finder, not to exceed $750,000; or (2) $200,000. *Id.* § 41.008(b). *But see id.* § 41.008(c).

For a detailed discussion of issues related to Texas punitive damage caps, *see* "Punitive Damages: Charge, Constitutionality, and Caps" by J. Brett Busby and Andrew L. Frey, State Bar of Texas Advanced Civil Appellate Practice Course (2007).

F. Evidentiary sufficiency challenges

Texas Rule of Civil Procedure 301 provides that "[t]he judgment of the court shall conform to the pleadings, 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." That means that if there is a lack of evidence supporting the amounts awarded by the jury—if the award does not "conform to … the nature of the case proved"—then the court cannot form a proper judgment. *See* TEX. R. CIV. P. 301.

A party may challenge the sufficiency of the evidence to support the verdict (including during the judgment formation stage) through a motion for judgment notwithstanding the verdict, or "JNOV." *See id.*; *Fort Bend Cty. Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). JNOV is warranted when (1) there is no evidence to support a jury finding, *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); (2) a factual issue was established as a matter of law that is contrary to the jury finding, *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173-74 (Tex. App.—Houston [1st Dist.] 1992, writ denied); (3) a legal principle prevents a party from recovering on the verdict, *id.*at 173; or (4) a jury finding is immaterial, *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995).

III. Prejudgment Interest

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 v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985)). It is "awarded to fully compensate the injured party, not to punish the defendant." *Brainard v. Trinity Universal Ins. Co.,* 216 S.W.3d 809, 812 (Tex. 2006).

Permitting awards of prejudgment interest is intended to (1) encourage settlements, and (2) 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.

A. Sources of Prejudgment Interest

There are three sources of law authorizing the recovery of prejudgment interest: (1) an enabling statute, (2) by contract, or (3) general principles of equity.

1. By Statute

The most common enabling statute, TEX. FIN. CODE §§ 304.101-107, applies to wrongful death, personal injury, and property damage cases. 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; *see also Mfrs. Auto Leasing, Inc. v. Autoflex Leasing, Inc.*, 139 S.W.3d 342 (Tex. App.—Fort Worth 2004, pet. denied); *Ciba-Geigy Corp. v. Stephens*, 871 S.W.2d 317, 321-322 (Tex. App.—Eastland 1994, writ denied) (loss of crops was property damage). Economic loss claims not governed by Section 304.101 include claims for breach of contract, breach of fiduciary duty, conversion and unfair competition, and tortious interference with a prospective contract. *Johnson & Higgins*, 962 S.W.2d at 530; *see also Assoc. Tel. Directory Publishers, Inc. v. Five D's Pub. Co.*, 849 S.W.2d 894, 900 (Tex. App.—Austin 1993, no writ); *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 637 (Tex. App.—San Antonio 1993, writ denied).

Despite the limits of the statute, the Texas Supreme Court has extended most of the statutory formulations on rate, accrual, and scope into the common-law setting, such that equitable

prejudgment interest is also be computed in accordance with the statute. *Johnson & Higgins*, 962 S.W.2d at 531-32.

Other statutes also provide for prejudgment interest in certain circumstances. For example, the Prompt Payment Act permits the recovery of prejudgment interest when a real property owner fails to pay a contractor within 35 days after it receives a request for payment for properly performed work on an improvement. *See* TEX. PROP. CODE § 28.004; *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 158 (Tex. 2015). And Texas Government Code § 2260.106 permits an award of prejudgment interest in certain contract claims brought against the government.

2. By Contract

Parties are free to agree by contract to any non-usurious 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.*, *Patriot Contracting, LLC v. Shelter Prods., Inc.*, 650 S.W.3d 627, 660 (Tex. App.—Houston [1st Dist.] 2021, pet. denied); *Pineda v. PMI Mortg. Ins. Co.*, 843 S.W.2d 660, 670-71 (Tex. App.—Corpus Christi 1992), *writ denied per curiam*, 851 S.W.2d 191 (Tex. 1993). Parties may also agree to forego prejudgment interest altogether. *Computer-Link Corp. v. Recognition Equip., Inc.*, 670 F. Supp. 455, 455-56 (D. Mass. 1987) (applying Texas law), *aff'd mem.*, 860 F.2d 1072 (1st Cir. 1988).

3. Equitable Prejudgment Interest

If prejudgment interest is not authorized by statute or the parties' contract, a court may award prejudgment interest under general principles of equity—both on compensatory damages and on equitable remedies. *Johnson & Higgins*, 962 S.W.2d at 528; *see, e.g.*, *Perry Roofing Co v. Olcott*, 744 S.W.2d 929, 930-31 (Tex. 1988) (contract damages); *Dernick Res., Inc. v. Wilstein*, 471 S.W.3d 468, 487-88 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (equitable fee-forfeiture award). A court's decision to award equitable prejudgment interest is discretionary, *Wagner v. Exxon Mobil Corp.*, 654 S.W.3d 613, 637 (Tex. App.—Houston [14th Dist.] 2022, pet. denied), but a court lacks discretion to award equitable prejudgment interest that would be directly at odds with a statute. *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 462 (Tex. 1998).

Where equitable principles weigh against the prevailing plaintiff, courts have refused to award prejudgment interest. *See, e.g.*, *Kurtz v. Kurtz*, No. 14-08-00351-CV, 2010 WL 1293769, at *11-12 (Tex. App.—Houston [14th Dist.] Apr. 6, 2010, no pet.) (affirming trial court's refusal to award prejudgment interest); *Cobb v. Morace,* No. 01-07-1036-CV, 2009 WL 2231909, at *8 (Tex. App.—Houston [1st Dist.] July 23, 2009, no writ) (mem. op.) (same); *City of Houston v. Texan Land & Cattle Co.,* 138 S.W.3d 382, 391 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (landowner was not entitled to recover both lost rents for five years and prejudgment interest on the fair market value of the land during that same period); *Miga v. Jensen*, 25 S.W.3d 370, 381 (Tex. App.—Fort Worth 2000) (award of prejudgment interest inequitable under circumstances), *rev'd on other grounds*, 96 S.W.3d 207 (Tex. 2002)).

B. Calculating Prejudgment Interest

Prejudgment interest is computed as simple interest (as opposed to compound), meaning that it is calculated on the principal amount only, not previously accumulated interest. TEX. FIN. CODE § 304.104; *Ventling v. Johnson*, 466 S.W.3d 143, 149 (Tex. 2015). The Texas Supreme Court recently reaffirmed that "absent clear and specific contractual or statutory authorization, compound interest is prohibited, and only simple interest is available." *See Samson Expl., LLC v. Bordages*, No. 22-0215, 2024 WL 2869049, at *9 (Tex. June 7, 2024). To determine simple interest, multiply the amount of the principal by the interest rate by the time of accrual (I = P x R x T). Those components are discussed below.

1. Principal

The principal, for purposes of computing prejudgment interest, is the amount of damages awarded by the factfinder, less the amounts on which prejudgment interest may not be awarded under statute or case law. *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 462-63 (Tex. 1998). Those exclusions are discussed below.

a) Statutory exclusions

Future Damages. Section 304.1045 of the Finance Code 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* TEX. FIN. CODE § 304.1045, § 304.101; *see also In re Xerox Corp.,* 555 S.W.3d 518, 531 (Tex. 2018) (orig. proceeding). 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; *see also KMG Kanal-Muller-Gruppe Deutschland GmbH & Co. KG v.*

Davis, 175 S.W.3d 379, 396-97 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Domingues v. City of San Antonio*, 985 S.W.2d 505, 511 (Tex. App.—San Antonio 1998, pet. denied).

Punitive damages. Because prejudgment interest serves to compensate the injured party, not punish the defendant, it may not be assessed or recovered on an award of punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.007; *Cavnar*, 696 S.W.2d at 555-56. Punitive damages are "by their very nature, unaccrued." *Cavnar*, 696 S.W.2d at 555-56

b) Case law exclusions

Attorneys' fees. Texas courts have almost entirely denied claims for prejudgment interest on attorneys' fees, whether interest is awarded under a statute or equity. *See Hervey v. Passero*, 658 S.W.2d 148, 149 (Tex. 1983) (award of attorneys' fees was not a contract "ascertaining the sum payable" under former version of statute); *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 Cnty. State Bank v. Keever*, 888 S.W.2d 790, 797 n.13 (Tex. 1994) (same); *Enserch Corp. v. Shand Morahan & Co.*, 952 F.2d 1485, 1500 & n.32 (5th Cir. 1992) (no prejudgment interest on attorneys' fees awarded pursuant to TEX. CIV. PRAC. & REM. CODE ANN. § 38.001); *Berry Prop. Mgmt., Inc. v. Bliskey*, 850 S.W.2d 644, 670 (Tex. App.—Corpus Christi 1993, writ dism'd) (prejudgment interest not available on DTPA award of attorneys' fees).

However, there remains a split of authority among the Texas courts of appeal regarding whether prejudgment interest can be recovered on attorney's fees paid before judgment. The Dallas and Houston (First) Courts of Appeals have expressly held that under no circumstances may prejudgment interest be recovered on attorneys' fees. *See Carbona v. CH Med., Inc.*, 266 S.W.3d 675, 688 (Tex. App.—Dallas 2008, no pet.); *Power Reps, Inc. v. Cates*, No. 01-13-00856-CV, 2015 WL 4747215 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.). But most other courts have taken a less rigid view and allowed a trial court to award prejudgment interest on attorneys' fees paid before judgment. *See Apache Corp. v. Castex Offshore, Inc.*, 626 S.W.3d 371, 385-86 (Tex. App.—Houston [14th Dist.] 2021, pet. denied); *Alma Invs., Inc. v. Bahia Mar Co-Owners Ass'n*, 497 S.W.3d 137, 146 (Tex. App.—Corpus Christi 2016, pet. denied); *Williams v. Colthurst*, 253 S.W.3d 353, 362 (Tex. App.—Eastland 2008, no pet.); *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712, 717 (Tex. App.—Amarillo 1992, writ denied).

Court costs. Prejudgment interest cannot be awarded on court costs. *C&H Nationwide*, 903 S.W.2d at 325.

DTPA treble damages & other statutory penalties. Because additional damages awarded under the Texas Insurance Code and the DTPA are essentially punitive damages, a trial court may not award prejudgment interest on the additional damages—only on the un-trebled actual damages amount. *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 137 (Tex. 1988); *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 54 (Tex. 1998). For the same reason, courts have also prohibited awards of prejudgment interest on other statutory penalties. *See, e.g.*, *State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 805 (Tex. 2007); *Frazin v. Sauty*, No. 05-15-00879-CV, 2016 WL 7163858, at *8 (Tex. App.—Dallas Nov. 7, 2016, pet. denied); *Dunn v. S. Farm Bureau Cas. Ins. Co.*, 991 S.W.2d 467, 478-79 (Tex. App.—Tyler 1999, pet. denied); *Alaniz v. Yates Ford, Inc.*, 790 S.W.2d 38, 39 (Tex. App.–San Antonio 1990, no writ).

2. Rate

In most cases, the prejudgment interest rate is determined under the Finance Code, which provides that it should be set at the same rate as post-judgment interest. *See* TEX. FIN. CODE § 304.103. As a result, when the Legislature amends the post-judgment interest rate, it also changes how prejudgment interest is calculated.

The post-judgment interest rate is the "prime rate as published by the Board of Governors of the Federal Reserve System on the date of computation," with a floor of 5% and a ceiling of 15%. TEX. FIN. CODE § 304.003. Because the prime rate fluctuates, the judgment should reflect the rate at the time the judgment is signed. 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 https://occc.texas.gov/publications/interest-rates. The current judgment interest rate is posted each month on this site in the OCCC's weekly publication, The Texas Credit Letter.

There are two circumstances when the interest rate may deviate from that provided by the analysis above. First, certain applicable statutes may call for a specific rate. For example, for prejudgment interest awarded under the Prompt Payment Act, "[a]n unpaid amount bears interest at the rate of 1-1/2 percent each month." TEX. PROP. CODE § 28.004. Likewise, parties to a contract may agree to a different prejudgment interest rate than defaulting to the Finance Code calculation. In such a case, the rate is the lesser of the interest rate specified in the contract or eighteen percent a year. TEX. FIN. CODE § 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; *Meridien Hotels, Inc. v. LHO Fin.*

P'ship I, LP, 255 S.W.3d 807, 823 (Tex. App.—Dallas 2008, no pet.) (applying § 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).

3. Time of Accrual

Whether prejudgment interest is awarded pursuant to the 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, and it stops accruing on the day preceding the date judgment is rendered. TEX. FIN. CODE § 304.104; *Johnson & Higgins*, 962 S.W.2d at 531.

Several issues often arise regarding the proper determination of the accrual date: (1) what constitutes sufficient "written notice of a claim" to trigger accrual, (2) what happens if the claim giving rise to prejudgment interest arose from the addition of a claim or defendant in an amended petition, (3) what happens when the claims arise from discrete, recurring events, (4) what happens if a defendant tenders partial or complete payment, and (5) under what circumstances can accrual be tolled? These questions are explored below.

a) "Written notice of claim"

For a letter to constitute "written notice of a claim," it is not necessary for all the damages to have been determined at the time of the letter is sent. *See, e.g. Bobo v. Varughese*, 507 S.W.3d 817, 821-26 (Tex. App.—Texarkana 2016, no pet.); *Nat'l Freight, Inc. v. Snyder,* 191 S.W.3d 416, 428 (Tex. App.—Eastland 2006, no pet.) (letter promised to send medical specials when client released from treatment); *Brookshire Grocery Co. v. Smith*, 99 S.W.3d 819, 824 (Tex. App.—Beaumont 2003, pet. denied) (letters constituting notice of claim informed insurance adjuster of procedures contemplated by claimant's doctor); *Bevers v. Soule*, 909 S.W.2d 599, 603 (Tex. App.—Fort Worth 1995, no writ).

But a demand letter will be deemed insufficient to trigger accrual of prejudgment interest, even if it registers complaints about performance of a contract, if it does not mention a right to damages against the defendant upon which the lawsuit was based. *See DaimlerChrysler Motors Co. v. Manuel*, 362 S.W.3d 160, 195-96 (Tex. App.—Fort Worth 2012, no pet.) (accrual of prejudgment interest cannot be based on demand for an unrelated claim arising from a different alleged contract made under entirely different circumstances); *see also Fleming & Assoc., L.L.P. v. Barton*, 425 S.W.3d 560, 577 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("[T]here is nothing in this email notifying F & A that any member of the Barton Group is demanding compensation or asserting a right to be paid"). Further, the notice must be "certain and unconditional," and it should urge its recipient "to accept an accrued, existing liability." *Toshiba Mach. Co., Am. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 786 (Tex. App.—Fort Worth 2005, pet. granted, judgm't vacated w.r.m.). If it is equivocal, urging its recipient only "to avoid a contingent, future liability," it is inadequate. *Id.*

b) Added claim or defendant

Another issue is when to commence accrual of prejudgment interest on claims and defendants that are added after suit is filed. Most Texas 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. Those courts have held that prejudgment interest is measured on a by-claim, by-defendant basis from the point where a particular claim is brought against a particular defendant in an original or amended petition. *See, e.g.*, *New Hampshire Ins. Co. v. Rodriguez*, 569 S.W.3d 275, 289 (Tex. App.—El Paso 2019, pet. denied); *Tex Star Motors, Inc. v. Regal Fin. Co.*, 401 S.W.3d 190, 204 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (recognizing that prejudgment interest accrues beginning on the date a particular cause of action is filed, even if a defendant had already been sued on other causes of actions); *see also I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 480 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Citizens Nat'l Bank Inc. v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 486-87 (Tex. App.—Fort Worth 2004, no pet.); *Qwest Commc'ns Int'l 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); *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 MBR & Assocs., Inc. v. Lile*, No. 02-11-00431-CV, 2012 WL 4661665, at *14 (Tex. App.—Fort Worth Oct. 4, 2012, pet. denied) (mem. op.); *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).

c) Discrete, recurring claims

In situations where there are discrete and recurring contrac-

tual breaches—for example continual missed monthly lease payments—prejudgment interest accrues separately for each post-suit breach. *See, e.g.*, *Subsea 7 Port Isabel, LLC v. Port Isabel Logistical Offshore Terminal, Inc.*, 593 S.W.3d 859, 877-78 (Tex. App.—Corpus Christi 2019, pet. denied). This circumstance often occurs in missed payments to contractors. As under the common law, the Texas Prompt Payment Act provides that "[a]n unpaid amount required under this chapter begins to accrue interest on the day after the date on which the payment becomes due." TEX. PROP. CODE § 28.004.

d) Tender of partial or complete payment

If a defendant unconditionally tenders part of the amount in dispute to the plaintiff before trial, interest will cease to accrue on the amount tendered whether the plaintiff accepts it or not. *Brainard v. Trinity Univ. Ins. Co.*, 216 S.W.3d 809, 816-17 (Tex. 2006); *Certain Underwriters at Lloyd's, London v. Prime Nat. Res., Inc.*, 634 S.W.3d 54, 83-84 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *Hand & Wrist Ctr. of Hous., P.A. v. Republic Servs., Inc.*, 401 S.W.3d 712, 721 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

e) Tolling of accrual

Prejudgment interest can still be tolled by a standstill agreement to temporarily suspend a lawsuit. *See Johnson & Higgins*, 962 S.W.2d at 531. In addition, a written settlement offer can toll the accrual of prejudgment interest while the plaintiff decides to accept the offer. *See* TEX. FIN. CODE § 304.105-.107(a).

Historically, courts had invoked equitable principles to toll the accrual period of prejudgment interest. *See C & H Nationwide, Inc.*, 903 S.W.2d at 326 (trial courts have discretion to toll the accrual of prejudgment interest in response to a plaintiff's delay); *see also City of Alamo v. Casas*, 960 S.W.2d 240, 260 (Tex. App.—Corpus Christi 1997, writ denied). But numerous courts have rejected attempts to toll prejudgment interest on equitable grounds in recent years. *See, e.g., Siam v. Mountain Vista Builders,* 544 S.W.3d 504, 514 (Tex. App.—El Paso 2018, no pet.); *Wells Fargo Bank, N.A. v. Militello,* No. 05-15-01252-CV, 2017 WL 2645430, at *18 (Tex. App.—Dallas June 20, 2017), *vacated in part*, No. 05-15-01252-CV, 2017 WL 3015726 (Tex. App.—Dallas July 17, 2017, pet. denied); *JSC Nizhnedneprovsky Tube Rolling Plant v. United Res., LP,* No. 13-15-00151-CV, 2016 WL 8921926, at *12 (Tex. App.—Corpus Christi Dec. 21, 2016, no pet.).

C. Other factors to account for in calculating prejudgment interest.

1. Settlement Credits

Courts have also grappled with how settlements payments affect the prejudgment interest calculation. 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 in time forward." *Id.* at 908; *see also Brainard*, 216 S.W.3d at 816-17.

2. Offsetting Damages

Whether offsetting damages should be deducted before calculation of prejudgment interest may turn on the specific language of the statute or contract upon which the recovery of prejudgment interest is based. For example, Texas Finance Code § 304.102 states that a "*judgment* in a wrongful death, personal injury, or property damage case earns prejudgment interest." TEX. FIN. CODE § 304.102 (emphasis added). Courts have concluded that because this section authorizes prejudgment interest on the "judgment"—which necessarily reflects offsets as opposed to "damages,"—prejudgment interest must be calculated based on the net award. *See, e.g.*, *Sisters of Charity of Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 117 (Tex. App.—Austin 1992, writ denied); *Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co.*, 173 F. Supp. 3d 363, 461 (N.D. Tex. 2016), *aff'd as modified and remanded*, 725 Fed. Appx. 256 (5th Cir. 2018).

But if a statute or contract provides that interest accrues on "unpaid amounts," as is the case with the Texas Prompt Payment Act, offsetting before calculating prejudgment interest may be unnecessary. *See* TEX. PROP. CODE § 28.004

("An unpaid amount required under this chapter begins to accrue interest on the day after the date on which the payment becomes due.")

D. Pre-judgment interest in federal court

In federal diversity cases, prejudgment interest is calculated according to state law. *See Boston Old Colony Ins. Co. v. Tiner Assocs., Inc.*, 288 F.3d 222, 234 (5th Cir. 2002). In federal question cases, prejudgment interest is determined by the relevant federal statute. If the statute is silent, then "the calculation of the prejudgment interest 'rests firmly within the sound discretion of the trial court.'" *Shenzen Syngergy Digital Co. v. Mingtel, Inc.*, No. 4:19-cv-00216, 2022 WL 2252583, at *2 (E.D. Tex. June 22, 2022) (citing *Guang Dong Light Headgear Factory Co. v. ACI Intern., Inc.*, No. 03-4165, 2008 WL 1924948, at *4 (D. Kan. Apr. 28, 2008) and *Hefei Ziking Steel Pipe Co., v. Meever & Meever*, No. 4:20-cv-00425, 2021 WL 4267162, at *9 n.6 (S.D. Tex. Sept. 20, 2021)). Federal courts can look to 28 U.S.C. § 1961 (post-judgment interest rate statute), other federal statutes, or state law in determining an appropriate interest rate and accrual date. *Id.* at *2, 4 & n.5 (citing cases).

IV. Post-judgment interest

Every money judgment in state court must provide for post-judgment interest. TEX. FIN. CODE § 304.001. Post-judgment interest is so fundamental that it is recoverable whether or not it is mentioned in the judgment. *See Office of the Attorney Gen. of Tex. v. Lee*, 92 S.W.3d 526, 528 (Tex. 2002) (holding pre-1999 post-judgment interest statute "does not require, as a prerequisite for accruing interest, that judgments specifically include an award of post judgment interest."); *see also, e.g.*, *Urquhart v. Calkins*, No. 01-17-00256-CV, 2018 WL 3352919, at *6 (Tex. App.—Houston [1st Dist.] July 10, 2018, pet. denied); *DeGroot v. DeGroot*, 369 S.W.3d 918, 927 (Tex. App.—Dallas 2012, no pet.).

A. Principal

The full amount of the money judgment—including prejudgment interest and court costs—is used in the post-judgment interest calculation. TEX FIN. CODE § 304.003(a); *Long v. Castle Tex. Prod. Ltd. P'ship,* 426 S.W.3d 73, 77 (Tex. 2014); *see also, e.g.*, *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2014 WL 6705741, at *2 (Tex. App.—Austin Nov. 14, 2014); *Dallas Cnty. v. Crestview Corners Car Wash*, 370 S.W.3d 25, 50-51 (Tex. App.—Dallas 2012, pet. denied).

B. Rate

Under Section 304.002 of the Finance Code, if the judgment is on a contract providing for interest, the post-judgment interest rate is the rate stated in the contract or 18 percent, whichever is less. TEX FIN. CODE § 304.002. If Section 304.002 does not apply, then the post-judgment 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 . . . is less than five percent; or
> (3) 15 percent a year if the prime rate . . . is more than 15 percent.

Id. § 304.003(a), (c).

C. Accrual

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), and it compounds annually, *id.* § 304.006.

Tolling. An exception to this rule exists for a period when a judgment creditor is granted an extension of time to file an appellate brief. During the period of extension, interest is tolled. *Id.* § 304.005(b); *see Waste Mgmt.*, 2014 WL 6705741, at *3.

In addition, "[a] judgment debtor's timely unconditional tender of payment of the judgment amount interrupts the running of post-judgment interest." *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 491-92 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *see also Certain Underwriters at Lloyd's, London v. Prime Nat. Res., Inc.*, No. 01-17-00881-CV, 2019 WL 7044667, at *22 (Tex. App.—Houston [1st Dist.] Nov. 26, 2019, no pet.).

Accrual on remanded cases. The Texas Supreme Court confirmed in a trio of cases that Section 304.005's reference to the "judgment" is to the *trial court's* judgment. *See Ventling v. Johnson*, 466 S.W.3d 143, 151 (Tex. 2015); *Long,* 426 S.W.3d at 77; *Phillips v. Bramlett*, 407 S.W.3d 229, 239-43 (Tex. 2013). In *Phillips*, the court held that when an appellate court remands a case to the trial court for entry of judgment consistent with the appellate court's opinion, and the trial court is not required to admit new or additional evidence to enter that judgment, then the date the trial court entered the original judgment is the "date the judgment is rendered," and post-judgment interest accrues as of that date. 407 S.W.3d at 239, 243.

Next, in *Long*, the court held that, when the trial court

must reopen the record to render judgment on remand, post-judgment interest will begin to accrue on the date the subsequent judgment is rendered. 426 S.W.3d at 81. The rationale behind this rule is that "a claimant is entitled to post-judgment interest from the judgment date once the trial court possesses a sufficient record to render an accurate judgment." *Id.* at 76.

Applying *Long*'s rationale, the court confirmed in *Ventling* that, when the trial court's only task on remand is the "ministerial act of entering the judgment as instructed," post-judgment interest began to accrue when "the court of appeals effectively rendered the judgment the trial court should have rendered." 466 S.W.3d at 152; *see, e.g.*, *Pollitt v. Computer Comforts, Inc.*, No. 01-17-00067-CV, 2018 WL 4780800, at *3 (Tex. App.—Houston [1st Dist.] Oct. 4, 2018, no pet.); *Whittington v. City of Austin*, 456 S.W.3d 692, 707-08 (Tex. App.—Austin 2015, pet. denied).

Accrual on appellate attorneys' fees. An award for conditional appellate attorneys' fees accrues post-judgment interest from the date the award is made final by the appropriate appellate court's judgment. *Ventling*, 466 S.W.3d at 156.

D. Post-judgment interest in federal court

In federal court, post-judgment interest is calculated at the federal rate, even in diversity cases. *See Boston Old Colony Ins. Co. v. Tiner Assocs., Inc.,* 288 F.3d 222, 234 (5th Cir. 2002). That calculation is set forth in 28 U.S.C. § 1961(a), which provides that "[s]uch interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." Subject to a few exceptions, such "[i]nterest shall be computed daily to the date of payment . . . and shall be compounded annually." *Id.* § 1961(b).

Texas follows "the American Rule, which provides that a prevailing party has no inherent right to recover attorney's fees from the non-prevailing party unless there is specific statutory or contractual authority allowing it."

V. Attorneys' fees

If properly pleaded and proved, a judgment may include an award of attorneys' fees, assuming the law permits such recovery. Texas follows "the American Rule, which provides that a prevailing party has no inherent right to recover attorney's fees from the non-prevailing party unless there is specific statutory or contractual authority allowing it." *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 487 (Tex. 2019); *see Tony Gullo Motors*, 212 S.W.3d at 310-11. The Texas Supreme Court's opinion in *Rohrmoos Venture* is a "must read" for the latest principles governing the recovery of attorneys' fees.

The most prevalent statutory bases to recover attorneys' fees in Texas concern breach of contract, declaratory judgment, and DTPA actions, but many other 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). "When fee-shifting is authorized, whether by statute or contract, the party seeking a fee award must prove the reasonableness and necessity of the requested attorney's fees." *Rohrmoos Venture*, 578 S.W.3d at 484.

A. Amounts awarded by jury or judge, if tried to the bench

Attorneys' fees awarded by the jury or judge must be stated as a specific amount, not as a percentage of the recovery. This has not always been clear. Before *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997), 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 Texas 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. 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., Inc.*, 59 S.W.3d 847, 869-70 (Tex. App.—Fort Worth 2001, pet. denied); *Transcon. Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 675 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Lubbock Cnty. v. Strube*, 953 S.W.2d 847, 858 (Tex. App.—Austin 1997, pet. denied).

And how must those fees be supported? Requested fees must be reasonable and necessary. The Supreme Court has made clear that fees should be calculated using the "lodestar" method—reasonable rate times reasonable time—subject to upward or downward adjustment based

on a number of judicially created factors. *Rohrmoos Venture*, 578 S.W.3d at 501-02. "Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.* at 498. "Contemporaneous billing records are not required," but they "are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." *Id.* at 502.

B. Conditional appellate attorneys' fees

A judgment may state a specific sum for legal work performed through trial and allow for additional specified "conditional" 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.). Generally, an award of attorneys' fees for appeal must be conditioned upon the appealing party being unsuccessful. *See, e.g.*, *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 attorneys' fees to condition the award on an unsuccessful appeal by the appellant); *Hoefker v. Elgohary*, 248 S.W.3d 326, 332 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding that award of appellate fees must be conditioned upon unsuccessful appeal). The rationale is that a successful party on appeal should not be forced to pay the unsuccessful party's attorneys' fees. *See Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 115-16 (Tex. 2018).

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 to clarify that the award of appellate attorney's fees is conditional. *See, e.g.*, *Ansell Healthcare Prods., Inc. v. United Med.*, 355 S.W.3d 736, 745 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Solomon v. Steitler*, 312 S.W.3d 46, 59 (Tex. App.—Texarkana 2010, no pet.).

A potential exception to the general rule exists when 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), *abrogated on other grounds by Ventling v. Johnson*, 466 S.W.3d 143 (Tex. 2015); *see also Roosth v. Roosth*, 889 S.W.2d 445, 456 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (noting that a trial court may "treat attorney fees as part of the division of the marital estate [and] may assess attorney fees as costs of court").

C. Important differences in federal practice

In state court, attorneys' fees are often awarded by a jury or judge at trial—unless the parties agree to try fees separately. But in federal court, "unless the substantive law requires [attorneys'] fees to be proved at trial as an element of damages," fees are to be sought by motion, which typically must be filed "no later than 14 days after the entry of judgment." FED. R. CIV. P. 54.

Conditional appellate fees, moreover, are not as straightforward. The Advisory Committee Notes for the 1993 amendment to Rule 54 state:

> If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal.

Courts in the Fifth Circuit are generally "hesitant to award such [conditional attorneys'] fees, because, typically, the Fifth Circuit will remand the appropriate fee determination once the claim for fees is ripe for adjudication." *See Centerpoint Energy Inc. v. Associated Elec. & Gas Ins. Sers. Ltd.*, No. CV 09-2018, 2011 WL 13134747, at *4 (S.D. Tex. Sept. 9, 2011); *see also In re Dickinson of San Antonio, Inc.*, No. 5:19-CV-01011-XR, 2020 WL 264976, at *6 (W.D. Tex. Jan. 16, 2020) (noting that "[a]lthough courts in the Fifth Circuit sometimes award conditional attorneys' fees," conditional fees are nevertheless "typically disfavored").

VI. Costs

Rule 131 provides that a "successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." TEX. R. CIV. P. 131. A court may, however, "adjudge the costs otherwise" for "good cause, to be stated on the record." TEX. R. CIV. P. 141. A trial court abuses its discretion if it fails to award costs to the successful party under Rule 131 absent a sufficient explanation of good cause on the record. *See Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001).

A. Awarded to "Successful Party"

The successful party is "one who obtains judgment of a competent court vindicating a civil right or claim." *Fortitude*

Energy, LLC v. Sooner Pipe LLC, 564 S.W.3d 167, 189 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *accord Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 587 (Tex. App.—San Antonio 2011, no pet.). Whether a party is successful is determined based on the judgment, rather than the verdict. *May v. Ticor Title Ins.*, 422 S.W.3d 93, 102 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

A party need not prevail on every claim to be "successful." *Christus Health v. Dorriety*, 345 S.W.3d 104, 117-18 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). And securing a take-nothing judgment may be "success" for purposes of the rule. *See Vela v. Catlin Specialty Ins. Co.*, No. 13-13-00475-CV, 2015 WL 1743455, at *15 (Tex. App.—Corpus Christi Apr. 16, 2015, pet. denied).

Texas courts have split over the proper allocation of costs when neither party is wholly successful. Some courts have held that a trial court has discretion to split costs between the parties when neither party was entirely successful. *See, e.g.*, *In re Peter & Camella Scamardo, FLP*, No. 10-17-00160-CV, 2018 WL 1528476, at *10 (Tex. App.—Waco Mar. 28, 2018, no pet.) (upholding an award that each party would bear its own trial-related costs when one party prevailed on what the trial court concluded was a *de minimis* claim but lost on a more significant claim); *Henry v. Masson*, 453 S.W.3d 43, 51 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (affirming trial court's refusal to award court costs against either party when both parties prevailed on their claims but neither party was wholly successful); *Niemeyer v. Tana Oil & Gas Corp.*, 39 S.W.3d 380, 390 (Tex. App.—Austin 2001, pet. denied) ("In effect, neither party was wholly successful; therefore, it was within the trial court's discretion to order each party to bear its own costs."); *Bayer Corp. v. DX Terminals, Ltd.*, 214 S.W.3d 586, 612 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (upholding trial court's refusal to award court costs when both parties prevailed on their claims). *Cf. Sullivan v. White*, No. 05-08-01160-CV, 2009 WL 1887328, at *2 (Tex. App.—Dallas June 18, 2009, no pet.) (holding that it was an abuse of discretion to award all costs to one party when both parties "were equally successful, and the trial court did not state good cause on the record for awarding costs differently").

But other courts have held that the party receiving the larger recovery is entitled to its costs. *See, e.g.*, *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 895 (Tex. App.—San Antonio 1996, writ denied) ("In suits involving claims and counterclaims, the party receiving the larger award is entitled to final judgment and recovery of its costs."); *Brender v. Sanders Plumbing, Inc.*, No. 02-05-67-CV, 2006 WL 2034244, at *7 (Tex. App.—Fort Worth July 20, 2006, pet. denied) ("Texas courts applying Rule 303 have determined that in suits involving claims and counterclaims, the party receiving the larger award is entitled to final judgment and recovery of costs."); *Plaza at Turtle Creek Ltd. v. Henry Bldg., Inc.*, No. 08-00-00416-CV, 2002 WL 59603, at *7 (Tex. App.—El Paso Jan. 17, 2002, no pet.).

In some instances, courts have upheld assessing costs against just one of multiple "losing" parties. *See, e.g.*, *Ruiz v. Guerra*, 293 S.W.3d 706, 723-25 (Tex. App.—San Antonio 2009, no pet.) (awarding costs against only one of two unsuccessful plaintiffs, who was the defendant's "true adversary."); *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 534 S.W.3d 558, 598 (Tex. App.—San Antonio 2017), *aff'd*, 593 S.W.3d 324 (Tex. 2020) (same).

B. Good cause standard

The "good cause" inquiry for awarding costs against the successful party is determined on a case-by-case basis. *Furr's Supermarkets,* 53 S.W.3d at 376. Good cause can include unnecessarily prolonging the litigation or unreasonably increasing costs incurred by the opposing party. *See, e.g.*, *Rogers v. Walmart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985); *see also Prime Income Asset Mgmt., Inc. v. Marcus & Millichap Real Estate Inv. Servs. of Tex., Inc.*, No. 01-13-00020-CV, 2014 WL 7473801, at *6 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, no pet.). The trial court may state good cause orally at a hearing, in a written order, or in the judgment. *Henry v. Masson*, 453 S.W.3d 43 (Tex. App.—Houston [1st Dist.] 2014, no pet.). But a statement in the record is essential because a trial court abuses its discretion if it awards costs against a successful party without stating good cause. *See, e.g.*, *Davenport v. Hall*, No. 04-14-00581-CV, 2019 WL 1547617, at *8 (Tex. App.—San Antonio Apr. 10, 2019, no pet.).

C. Taxable and Non-taxable 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. Each party is responsible for accurately recording the costs and fees it incurred during a lawsuit so that the judgment may provide for the adjudication of such costs. TEX. CIV. PRAC. & REM. CODE § 31.007(a).

"[T]he rules do not require a successful party in a lawsuit to submit an accounting of its court costs to the trial court and opposing counsel *before* the entry of a judgment adjudicating costs." *Diggs v. VSM Fin., L.L.C.*, 482 S.W.3d 672, 674 (Tex. App.—Houston [1st Dist.] 2015, no pet.); *see* TEX. CIV. PRAC. & REM. CODE § 31.007(a); TEX. R. CIV. P. 129, 131, 622.

Indeed, "[a]lthough somewhat vague as to procedure," Section 31.007(a) "clearly does not require a formal presentation of evidence of a party's costs during trial." *Nolte v. Flournoy*, 348 S.W.3d 262, 271 (Tex. App.—Texarkana 2011, pet. denied) (quoting *Varner v. Howe*, 860 S.W.2d 458, 466 (Tex. App.—El Paso 1993, no writ)).

The successful party need only present an itemized list of the costs and fees incurred during the lawsuit to the clerk, and the clerk, in turn, will send a cost bill to the party against whom costs were taxed. *See Diggs*, 482 S.W.3d at 674. Taxing costs, as distinguished from adjudicating costs, is a ministerial duty of the clerk; therefore, to the extent that a party complains about the taxation of any specific costs, the appropriate remedy is a motion to re-tax costs. *See Campbell v. Wilder*, 487 S.W.3d 146, 152 (Tex. 2016) (explaining that a motion to re-tax costs "confronts the correctness of the clerk's ministerial calculations" and "is the proper method for correcting errors such as miscalculating the cost of an item or billing an item that is not statutorily taxable"); *Gumpert v. ABF Freight Sys., Inc.*, 312 S.W.3d 237, 239 (Tex. App.—Dallas 2010, no pet.); *Madison v. Williamson*, 241 S.W.3d 145, 158 & n.3 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Because taxing costs is a ministerial clerk duty, the motion may be filed even after the case has been disposed of on appeal, as long as it is filed before the mandate issues and the costs are paid. *See Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, No. 03-10-00826-CV, 2014 WL 6705741, at *4–5 (Tex. App.—Austin Nov. 14, 2014, no pet.).

Because "the power to tax costs does not include power to tax items normally not allowed," the sections below list various items that may or may not be recoverable as costs. *See Sterling Bank v. Willard M, L.L.C.*, 221 S.W.3d 121, 125 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 534 S.W.3d 558, 596 (Tex. App.—San Antonio 2017), *aff'd*, 593 S.W.3d 324 (Tex. 2020) ("[W]hether a particular expense is permitted by statute or rule to be recovered as a cost is a question of law subject to de novo review.").

1. Taxable Costs.

The following can be recovered as court costs under Texas Rule of Civil Procedure 131: (1) clerk fees; (2) service fees, such as filing fees, subpoena fees, and citation fees; (3) court-reporter fees for original stenographic transcripts of hearings; (4) deposition costs; (5) fees for court-ordered mediation; (6) court-appointed special master fees; (7) interpreter fees; (8) reasonable guardian ad litem fees; (9) court-appointed auditor fees; (10) court-appointed receiver fees; (11) statutory fees for witness subpoenaed to attend trial or deposition; (12) fees for required copies, such as copies required by statute or rule; (13) costs of tests or procedures mandated by statute; (14) interest on court costs; (15) other costs and fees permitted by law.

2. Nontaxable Costs.

The following are expenses that are not taxable under the rules and statutes: (1) attorneys' fees; (2) expenses for copies are generally not taxable; (3) the cost of video depositions or copies of depositions or transcripts; (4) expert fees necessary to establish an evidentiary matter (with some exceptions); (5) "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, office air-conditioning, and secretarial overtime; (6) estimated expenses of collection; (7) cost of supersedeas bond premiums; or (8) computerized legal research expenses.

D. Differences in federal practice.

In federal court, an award of costs incident to a judgment is considered a procedural issue governed by federal law, so state law is irrelevant, even in diversity cases. *Carter v. General Motors Corp.*, 983 F.2d 40, 43–44 (5th Cir. 1993). Costs may be awarded to the prevailing party under FED. R. CIV. P. 54(d)(1), upon the filing of a motion after entry of judgment. The "prevailing party" under the case law is decided under what is called the "judgment winner test"—the party in whose favor judgment was entered, even if that judgment does not fully vindicate all of that party's positions. *See West Bend Mut. Ins. Co. v. Belmont State Corp.*, 712 F.3d 1030, 1035 (7th Cir. 2013).

The awardable costs and expenses include, but are not limited to, clerk and court fees, marshal fees, court reporter fees, printing charges, fees for copies of necessary documents, courier charges, and costs to process documents for review and production. *See* 28 U.S.C. § 1920; *see also* 28 U.S.C. § 1923 (permitting award of docket fees); 28 U.S.C. § 1828 (permitting award of costs associated with compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services); 28 U.S.C. § 1821 (permitting recovery of daily witness attendance fees, including travel expenses).

While the district court has discretion to limit or deny otherwise taxable costs to the prevailing party, Rule 54(d)(1) creates a strong presumption that the prevailing party will recover costs. *Salley v. E.I. DuPont de Nemours & Co.*, 966 F.2d 1011, 1017 (5th Cir. 1992). The district court may not deny costs without an explanation, unless the reasons for the denial are obvious from the plain face of the record. *See*

Faludi v. U.S. Shale Solutions, L.L.C., 950 F.3d 269, 276 (5th Cir. 2020) (issue of costs was remanded to district court to either award costs to prevailing defendant or provide reasons for declining to do so); *Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 216–217 (5th Cir. 1991) (requiring explanation for denial of costs).

VII. Conclusion

This paper has noted some common issues that arise and should be considered when converting a verdict into an enforceable judgment. We hope that this paper provides a useful checklist for putting together a legally sound judgment.

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