CALCULATING PREJUDGMENT INTEREST ON CONTRACT CLAIMS

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PREJUDGMENT INTEREST CAN add 25% or more to the damages awarded in a breach of contract action in Texas, as a matter of right, on a judgment rendered three years after suit was filed.[1] If the contract specifies an 18% rate of interest, that interest could nearly double the damages awarded in a judgment rendered just four years after the breach. Given this potential impact, the rules for obtaining and calculating prejudgment interest should be considered long before the successful claimant moves for the entry of judgment.

This article will attempt to draw a roadmap of the current scheme, while pointing out potholes yet to be navigated. It will focus first on "equitable" prejudgment interest, then explore some of the different rules that may apply when a contract specifies a rate of interest for past-due debts.

A. Background: The Merger of Statutory and "Equitable" Prejudgment Interest

Historically, if the parties to a contract had not agreed to a rate of interest, an award of prejudgment interest in Texas usually had two potential sources: article 5069-1.03 of the Texas Revised Civil Statutes or "general principals of equity." An abridged history of the evolution of these schemes is necessary to understand why the calculation of prejudgment interest remains uncertain, and less than intuitive, in many respects.

1. The Demise of the Statutory Six Percent Scheme

Before 1997, article 5069-1.03 provided that interest at the rate of six percent per annum accrued on all "contracts ascertaining the sum payable," commencing on the 30th day after the due date. The courts had liberally construed the statute to allow prejudgment interest on a broad class of contract claims.[2]

In 1997 and 1999, however, the legislature repealed article 5069-1.03 and enacted a substantially changed version, in the course of moving the interest statutes to the new Texas Finance Code.[3] Instead of referring to contracts "ascertaining the sum payable," the new provision, found in Finance Code § 302.002, states:

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

Although versions of article 5069-1.03 had been a basis for the recovery of prejudgment interest in Texas since the nineteenth century,[4] several courts of appeals have held that this new provision *never* supports an award of prejudgment interest. Some of those courts have looked to the Finance Code's definitions of the terms "creditor," "obligor," and "legal interest," which explicitly exclude judgment creditors, judgment obligors, and judgment interest, respectively, to conclude that the legislature meant to exclude § 302.002 as a basis for prejudgment interest.[5] Other courts have simply reasoned that this provision does not govern prejudgment interest because it appears in the section of the Finance Code entitled "Usurious Interest."[6] The ultimate logic of these decisions might be that § 302.002's permissive language ("may charge") means that creditors may only *charge* six percent interest in the absence of an agreement to the interest rate but, if they have to sue to collect, the courts will *award* them interest at whatever rate the common law provides.[7]

Other courts have avoided awarding interest under § 302.002 by limiting its application to a rather small class of contracts, based on the Code's definition of "creditor" as a person who "loans money or otherwise extends credit."[8] While the term "otherwise extends credit" might be construed broadly to include the involuntary extension of credit that occurs when any debtor fails to pay a contract debt, these courts appear to have limited the statute's scope to agreed extensions of credit.[9]

Presumably, credit agreements without an agreed rate of

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interest are not common. Accordingly, if any "six percent" scheme survives as a basis for prejudgment interest, its application could be rare.

2. "Equitable" Interest: Development of the Quasi-Statutory Scheme

Until 1998, if article 5069-1.03 could not be stretched to fit the claim, Texas courts had nonetheless long awarded prejudgment interest in most contract cases as a matter of equity. The courts based such awards on the "incontrovertible" proposition that a defendant benefits from the unrestricted use of money that should have been paid to the plaintiff,[10] that a "gross injustice" would result if plaintiffs were compensated "by any sum less than the principal and the interest on the debt from the time at which it ought to have been paid."[11] Therefore, prejudgment interest was recoverable as a matter of right on contract claims when an ascertainable sum of money was determined to have been due and payable on a date certain prior to judgment.[12]

For personal injury cases, the legislature enacted a statutory scheme for awarding prejudgment interest (the "PI interest statute") in 1987.[13] This statutory scheme contained two substantial deviations from normal concepts of "interest." First, it provided that interest would begin to accrue, regardless of the actual date of injury, on the earlier of (i) 180 days after the Defendant receives written notice of the claim or (ii) the filing of the lawsuit. Second, as subsequently construed by the Supreme Court, the statute allowed prejudgment interest even on *future* damages.[14]

By its plain language, the PI interest statute applied only to personal injury, wrongful death, and property damage cases. Nonetheless, in 1998 the Supreme Court broadly declared that it would "adopt the legislative approach to prejudgment interest" in contract and other common law cases, in order to "restore uniformity" to the law of prejudgment interest, in *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*[15] The court specifically adopted the provisions of the PI interest statute governing the rate of interest, and—most significantly—compounding and accrual date.

The *Kenneco* court announced that, under this rule, fair compensation was no longer the primary function of prejudgment interest. Rather, the court declared that prejudgment interest would now serve as "a system of rewards and penalties intended to encourage settlements."[16]

3. Post-Kenneco

Kenneco's broad adoption of the "legislative approach" left undecided whether other aspects of the PI interest statute, such as its tolling provisions, were also applicable to contract cases.[17] The courts have uniformly assumed, however, that the common law rules were to remain linked to the PI interest statute in the future, so that amendments to the PI interest statute would result in lockstep changes in these quasi-statutory "common law" rules. Accordingly, any analysis of the "common law" rules for prejudgment interest begins with the current version of the PI interest statute, now found at § 304.101 *et seq.* of the Finance Code.[18]

In fact, the legislature has substantially altered the statutory scheme since 1998. These changes include a reduction in the minimum interest rate to an effectively nominal limit, the exclusion of future damages from the calculation, and the repeal of the discretionary "tolling for delay" provision. These amendments have not just changed the rules; arguably, they have removed any rational basis for applying the PI interest statute to contract disputes in the first place. Indeed, in recent years the Supreme Court has seemingly rejected, albeit indirectly, *Kenneco*'s fundamental premise that "prejudgment interest" can legitimately serve some purpose other than compensation for the lost time value of money.[19] Accordingly, some of the "rules" addressed by this article can be described only as probabilities, and rely on current precedent which may soon be relegated to historical anomaly.

B. The Role of Discretion

While the courts of appeals purport to use the "abuse of discretion" standard for reviewing prejudgment interest awards, the current PI interest statute does not explicitly provide for discretionary exceptions to its rules. Accordingly, a court's discretion is probably limited to determining the facts needed to apply the statutory scheme. For example, if a party asserts accrual based on written notice of the claim, but delivery of such a notice is disputed, the trial court's findings as to the existence and content of the alleged notice are probably entitled to deference. The sufficiency of a particular document to serve as "notice," however, is a question of law.[20]

Nonetheless, as discussed below, some courts have held that the decision to award quasi-statutory prejudgment interest *at all* is still left to the trial court's discretion.[21] *Kenneco* does not support this conclusion. On the other hand, *Kenneco*'s accrual-date rule is arguably ripe for overruling. While that topic is beyond the scope of this article, the practitioner should be aware that courts may be inclined to chip away at its certainty through an exercise of "discretion" to award true equitable relief.

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C. Calculating Interest Under the Quasi-Statutory Scheme

The following are the rules under current precedent for calculating quasi-statutory "equitable" prejudgment interest, whenever no contract or statute governs the award.

1. Interest Rate

The interest rate equals the statutory post-judgment rate (the "judgment rate"),[22] which is the bank prime rate, subject to a minimum of 5% and maximum of 15%.[23] The judgment rate is published monthly on the internet by the Texas Consumer Credit Commission.[24]

No Compounding. Quasi-statutory prejudgment interest accrues as simple interest.[25]

No Usury Limitation. Quasi-statutory prejudgment interest, being the result of judicial action rather than contract, is not subject to the limitations of the usury laws.[26] This rule likely leads to the anomalous result that a claim on an oral agreement without an agreed interest rate can earn prejudgment interest at rates up to 15%, while the same agreement with an *agreed* interest rate of 15% would be usurious and "contrary to public policy," subjecting the claim to offsetting penalties.[27]

2. Principal Amount

Past damages only. Prejudgment interest accrues only on pre-trial damages, not future damages.[28] A claimant waives prejudgment interest if it does not ask for jury findings that segregate past and future damages.[29]

While the exclusion of future damages may seem obvious, it derives only from the assumption that the quasi-statutory "common law" rules automatically change as the statute is amended. Prior to 2003, the Supreme Court had construed the PI interest statute to *require* prejudgment interest awards on future damages. If *Kenneco*'s broad adoption of the PI interest statute was complete, then this same rule necessarily applied to contract cases, regardless of the proposition's merit.[30] By virtue of a 2003 amendment, however, the PI interest statute now clearly prohibits the inclusion of future damages in the calculation on prejudgment interest.[31] The courts have presumed that this equally amended the quasi-statutory "equitable" scheme.[32]

Attorneys' Fees/Costs. Prejudgment interest is not recoverable on attorney's fees awarded pursuant to statute, or on costs of court.[33] A contrary rule might be argued for attorneys' fees allowed pursuant to a contractual attorneys' fees provision, on the theory that fees in that instance are part of the damages for breach of contract.

Offsets and Settlement Credits. Prejudgment interest is calculated on the judgment amount, not the amount of damages awarded by the jury.[34] Hence any credits or offsets due a defendant should be deducted from the total damages awarded before prejudgment interest is calculated.[35]

Settlement credits are applied to the principal according to the dates that the payments were received, under the "declining principal" method of calculation. Under this method, a settlement payment is credited as of the date of the settlement payment, first to accrued prejudgment interest, then to past damages, thereby reducing or perhaps eliminating prejudgment interest from that point in time forward.[36]

3. Accrual Date

Kenneco Rule. Prejudgment interest begins to accrue on the earlier of (i) 180 days after the date a defendant receives "written notice of a claim" or (ii) the date suit is filed.[37] Accrual ends the day preceding the date judgment is rendered.[38]

Sufficiency of Notice. A document serves as sufficient notice of a "claim" if it notifies the defendant of "a demand for compensation or an assertion of a right to be paid."[39] A "claim" need not demand an exact amount or list every element of damage.[40] Hence, *Kenneco* held that a tolling agreement sufficed as written notice, when its preamble asserted the plaintiff's liability contention.[41]

Nonetheless, one court has held—as a matter of law—that a letter did not give notice of a "claim" when it complained of a delivered machine's non-compliance with contract specifications, stated the amount of damages incurred and accruing, and threatened litigation, because the letter concluded by asking for a cure or rescission of the contract.[42] The court offered no explanation of why a demand for cure was not a sufficient "assertion of a right," nor did it attempt to reconcile its holding with *Kenneco*'s conclusion that a mere tolling agreement gave sufficient notice of the claim or describe any policy that would be furthered by such a conclusion.

At the other extreme, a court ruled that the filing of a divorce suit was sufficient notice of a claim to marital assets, such that interest should accrue from the date of the property division agreement entered more than 180 days later.[43] In other

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words, the court held that notice of a claim on the contract was delivered long before the contract even existed.

Date of Lawsuit. When a claim is first asserted in one lawsuit, then dismissed and re-asserted in another lawsuit, quasi-statutory interest can accrue from the original lawsuit's filing date.[44] Interest will not accrue based on the filing date as to a defendant added to a pending lawsuit, however, until the petition is amended to add that party.[45]

Declaratory Judgment Amounts. At least one court has held that the *Kenneco* rule delays the accrual of interest even in an action to enforce an award of money in a prior declaratory judgment. Specifically, the court held that a divorce judgment awarding specific funds to a spouse did not automatically accrue post-judgment interest, and hence prejudgment interest in the subsequent suit to enforce the judgment did not accrue until one of the *Kenneco* accrual dates had occurred.[46] Accordingly, the prudent practitioner should seek an award akin to post-judgment interest in connection with any declaratory judgment requiring the defendant to turn over a sum of money.

Is Kenneco Absolute? The *Kenneco* court dictated its accrual date rule in terms that seemed absolute, and adopted a statute which appears equally non-discretionary.[47] The rule clearly under-compensates a claimant where the damages, as in *Kenneco* itself, accrued long before notice or suit. Several courts have held that, by necessary implication, the rule also requires the over-compensation of claimants whose damages largely accrue between the dates of suit and judgment, such as those claiming under a contract requiring monthly payments.[48] Logic dictates that the *Kenneco* court intended to condone such "over-compensation" since, at the time, the court had construed the PI interest statute to award prejudgment interest even on future damages.

Nonetheless, some courts have suggested that a trial court has discretion to deny prejudgment interest entirely if it appears that the award would over-compensate the plaintiff.[49] This started with the intermediate decision in *Miga v. Jensen* ("*Miga I*"), where the plaintiff had recovered as damages the pre-trial appreciation in the value of stock that the defendant had failed to deliver when promised.[50] *Miga I* held that it would be an inequitable "windfall" to allow a plaintiff to recover prejudgment interest from the time of suit, when in effect damages had actually accrued at the time of trial.

Miga I, however, failed to consider that the *Kenneco* dates are not based on "equity." The Supreme Court reversed this holding of *Miga I*, in the course of holding that "lost appreciation" was an invalid measure of damages with which to start. Nonetheless, some courts have continued to follow the discretionary premise of *Miga I*. For instance, one court recently upheld a denial of prejudgment interest in a breach of fiduciary duty case, even though nothing in the record explained the reason for the denial.[51] Another court attempted to reconcile such a discretionary exception with *Kenneco* by holding that, once the trial court decides to award prejudgment interest, the court *must* follow the accrual rule dictated by *Kenneco*.[52]

This "all or nothing" approach seems inconsistent, however, with normal concepts of "discretion" or "equity." Such a "discretionary" approach skews, in favor of defendants, the legislative balance struck in the prophylactic PI interest statute, by suggesting that interest can be denied when it appears to "over-compensate" a claimant while providing no discretionary relief when the statutory scheme would severely *under*-compensate the claimant. For equity to be served by a discretionary standard, the courts would have to be given discretion in all cases to use accrual dates which reflect the true dates of economic loss.

4. Tolling the accrual of interest.

Settlement Offer Tolling. Under the PI interest statute, no interest accrues on the amount of a written settlement offer—reasonable or not—during the period in which the offer can be accepted.[53] The courts of appeals have not agreed on whether *Kenneco*'s seemingly-broad adoption of the PI interest statute included an adoption of this provision.[54]

If adopted, this provision arguably allows a defendant to make an open-ended settlement offer at the beginning of a suit, and thereby stop the accrual of any interest on that amount. At least one court, however, has held that a plaintiff can re-start the accrual of interest by simply rejecting the offer, so that it can no longer be accepted.[55]

If the statutory provision does not apply to contract actions, then a long-standing common law rule nonetheless allows a defendant to avoid the accrual of interest if it tenders the full amount ultimately determined to have been owed.[56] An actual tender may not be necessary, if the claimant both made an excessive demand and unequivocally informed the defendant by words or acts that no lesser payment would be accepted.[57] In addition, a defendant may be able to avoid interest on an amount less than the actual judgment, if that amount was tendered unconditionally.[58]

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Tolling for "Delay." Prior to 2003, the PI interest statute gave the courts broad discretion to toll the accrual of interest during periods of delay in the trial, considering delays caused by both plaintiff and defendant.[59] With the 2003 repeal of this provision, the courts will presumably return to the common-law rule that courts have no discretion to alter the calculation of interest based on allegations of delay caused unilaterally by one party.[60]

Standstill Agreements. On the other hand, if the parties to a dispute *agree* to delay or suspend litigation—such as through a pre-suit agreement to extend the statute of limitations on a claim, or a post-suit agreement to suspend all aspects of a suit—prejudgment interest will cease to accrue while the agreement is in effect unless the agreement expressly provides otherwise.[61] A general reservation of rights may be sufficient to preserve the accrual of interest, however, because *Kenneco* held that a standstill agreement had "provided otherwise," and had "expressly" reserved the plaintiff's right to prejudgment interest, when it broadly stated: "Except as expressly provided [herein], nothing in this agreement, or the recitals set forth herein, shall prejudice, influence or in any way affect any rights, liabilities, defenses, counterclaims or setoffs which may be asserted by either party hereto in this or any other proceeding."[62] Accordingly, a claimant should always ask for this precise language to be included in any kind of limitations-tolling or other standstill agreement.

5. Effective Date of Rule Changes

Some courts have construed a footnote in *Kenneco* as holding that an award of prejudgment interest is always governed by the statute in effect at the time of judgment.[63] This proposition is an overstatement at the very least. When the legislature has specified the effective date of an applicable statute, the courts will enforce that date.[64] Accordingly, because the "equitable" scheme now follows the statutory scheme, the courts have uniformly looked to any effective dates set forth in the enabling acts when considering the applicability of implied amendments to the quasi-statutory scheme.[65]

At any rate, all amendments to the PI interest statute since *Kenneco* have provided that they do, in fact, apply to any final judgments rendered after the act's effective date. Such a rule does not violate the constitutional prohibition on retroactive laws, because the right to statutory or equitable prejudgment interest is not "vested" until reduced to judgment.[66]

That said, an interesting issue arose with the substantial 2003 amendments to the PI interest statute, because the legislature specified that the changes also affected all cases in which a final judgment was "subject to appeal" after the effective dates of the amendments. Many defendants claimed that this required a reduction of prejudgment interest awards in every case then pending in the appellate process. The courts of appeals uniformly rejected this argument, however, by construing "subject to appeal" to refer only to interlocutory judgments which become final, and hence "subject to appeal," after the effective date.[67]

6. Pleading and Proof

The courts may take judicial notice of the judgment interest rate.[68] In order to avoid the technical question of whether a particular type of interest is available under a general prayer for relief, a claimant should always request prejudgment interest specifically in its pleadings.

If a claimant intends to assert an accrual date earlier than the filing of suit, it will need to prove the delivery and content of the written notice of the claim.

If the relevant facts for calculating prejudgment interest are undisputed, the calculation and award are matters of law for the trial court to decide.[69] Even when they are disputed, most cases assume that the issue should be resolved by the trial judge, with the findings reviewed under an abuse of discretion standard.[70] On the other hand, one court has held that a defense of effective tender of payment, which would toll the accrual of interest, presents a fact question that is waived if not submitted to the jury.[71] The jury in that case was also instructed to determine the amount of interest owed, and the court of appeals refused to re-calculate the interest that should have been awarded on a liquidated debt, where competing calculations (one of which had to have been wrong) were admitted into evidence.[72]

D. Other Statutory Schemes

"Equitable" prejudgment interest is not available when a statute mandates a different rule for the accrual of interest. For example, there are no equitable exceptions to the Natural Resources Code's provision allowing a party to suspend the payment of proceeds from the sale of oil or gas, without interest, when a title dispute affects the distribution.[73]

E. Calculating Interest When the Rate is Agreed

When a contract specifies a rate of interest on overdue debts, the courts have always enforced that agreement—subject only to the constraints of the usury laws—on the reasoning that the interest contracted for is as much a part of the debt as the principal.[74] Presumably, therefore, general principals of

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contract construction should govern the application of such agreements, without regard to the rules of the PI interest statute. Since such agreements do not typically address specific circumstances, however, this section explores how some of the default "common law" rules of prejudgment interest may intersect or contrast with the rules for awarding contract-based prejudgment interest.

1. Interest Rate

Limited by Kenneco? Although *Kenneco* purported to supply a new rule of prejudgment interest "under the common law," it clearly did not mean to address contracts which specify a rate of interest.[75] Nonetheless, the Fourteenth Court looked to *Kenneco* to determine the legal limit on a contract-specified interest rate in *Cook Composites, Inc. v. Westlake Styrene Corp.*[76] Specifically, the court reasoned that (a) under *Kenneco* (and the PI interest statute) the prejudgment interest rate equals the judgment rate; (b) when a contract specifies a rate of interest, the statutory judgment interest rate is the contract rate, but limited to a maximum of 18% a year; and (c) therefore, contractual prejudgment interest cannot exceed 18% a year.

Cook Composites, however, addressed an argument that the contractual rate of interest at issue did not contractually apply to the particular damages alleged.[77] The court may have just assumed that this argument was valid, so that only "equitable" prejudgment interest was available, and then used the statute to nonetheless apply the contract rate.

Arguably, such a "back door" approach should have brought all of the *Kenneco* rules into play, including those mandating delayed accrual and the use of simple interest only. *Cook Composites* did not address this. Nor did it consider whether the "contract rate" judgment interest rate would itself apply to a judgment on claims not within the contractual scope of an interest rate agreement. Of course, this is of little consequence as *Cook Composites*' discussion of the limits on interest rates was *dicta*, because the successful plaintiff had not complained of that restriction. Agreed prejudgment interest rates are logically limited only by the usury laws, and not by the PI interest statute.

Compounding. Although equitable prejudgment interest accrues only as simple interest, contractual prejudgment interest arguably compounds according to the period by which the contract rate is defined. For example, *Cook Composites* held that a contract specifying interest at 1.5% per month calls for monthly compounding of interest.[78] The court indicated that it would have approved of such compounding if it had not resulted in a rate higher than 18% per annum, despite the court's reliance on *Kenneco* to otherwise limit contractual prejudgment interest to 18%. Presumably, the courts would at least enforce a contractual provision which explicitly dictates compounding.

2. Principal Amount

Attorneys' Fees. If a contract provides an interest rate for sums owed under the contract, and also specifies that attorneys' fees are recoverable, there would be a good argument that interest could be awarded on the fees portion of the contract debt. The counter-argument would be that the fees portion of the debt is not owed, and therefore does not accrue interest, until the time of judgment.

Offsets/Credits. The general rule of offsets—that they are applied before the calculation of interest—probably presumes that the offset claims would have earned interest at the same rate as the main claim. In such a case, the order of applying credits and interest does not change the result. When the competing claims would have different accrual dates or interest rates, however, application of the general rule would provide a windfall to the party with the later claim and/or lower applicable interest rate. That is, it would effectively eliminate the benefit of the higher interest calculation on all amounts up to the size of the offset claim. In that instance, logic would dictate that interest be added to both the main claim and offset claim, before applying the offset.

3. Accrual Date

When the contract is the source of an interest award, the courts should continue to apply the pre-*Kenneco* rule that interest accrues from the date or dates on which ascertainable sums should have been paid.[79] Although one court has approved of the use of *Kenneco*'s accrual dates, even when the contract specified that interest would accrue starting 15 days after each invoice, this statement was *dicta* because the plaintiff had not complained of the trial court's failure to use the earlier dates specified in the contract.[80]

4. Proof of Agreement

An agreement to pay a particular rate of interest can be proven like any other contractual term. For example, regular invoices asserting an interest rate for late payments, accepted without objection over a period of time, might prove an agreement through course of dealing.[81]

F. Conclusion and Caution

The Supreme Court has yet to address two critical aspects of prejudgment interest law, as it applies to contract

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claims. Foremost of these is the continuing validity of the accrual-date and simple interest rules adopted in *Kenneco*, in light of major legislative changes to the adopted interest rate scheme and the court's own apparent rejection of *Kenneco*'s underlying premise that interest has a legitimate function other than compensation. Second is the scope and enforceability of Finance Code § 302.002, providing an interest rate for "creditors" and "obligors." Until these issues are addressed, however, the rules set forth above outline the "most likely" method of calculating interest under current precedents.

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[1] Based on the February 2007 judgment interest rate of 8.25%.

[2] *Great American Ins. Co. v. North Austin Mun. Utility Dist. No. 1,* 950 S.W.2d 371, 372 (Tex. 1997) (holding that statute provided interest rate whenever the contract (1) provided the conditions upon which liability depended, and (2) fixed a measure by which damages could be ascertained with reasonable certainty, even if extrinsic evidence was required).

[3] For an account of the convoluted history of this change, *see Walden v. Affiliated Computer Serv., Inc.*, 97 S.W.3d 303, 329-30 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

[4] Lonny J. Hoffman, *Recovery and Calculations of Prejudgment Interest Under Texas Law*, 35 S. Tex. L. Rev. 439, 451 & n.86 (1994).

[5] *See Walden*, 97 S.W.3d at 329-31; *Lucke v. Kimball*, No. 13-01-362-CV, 2004 WL 102830, at *9 (Tex. App.—Corpus Christi Jan. 22, 2004, pet. denied); *Cumberland Cas. & Sur. Co. v. Nkwazi, L.L.C.*, No. 03-02-00270-CV, 2003 WL 21354608, at *6 (Tex. App.—Austin June 12, 2003, no pet.).

[6] *De La Morena v. Ingenieria E Maquinaria De Guadalupe, S.A.*, 56 S.W.3d 652, 659 (Tex. App.—Waco, 2001, no pet.); *El Paso National Gas Co. v. Lea Partners, L.P.*, No. 08-01-00310-CV, 2003 WL 21940729, at *10 (Tex. App.—El Paso Aug. 14, 2003, pet. denied).

[7] *But see Adams v. H&H Meat Prod., Inc.*, 41 S.W.3d 762, 780 (Tex. App.—Corpus Christi 2001, no pet.) (holding that buyer had agreed to 12% interest merely because seller's invoices stated that 12% interest would be charged).

[8] TEX. FIN. CODE §301.002(a)(3); *see also* TEX. FIN. CODE § 301.002(a)(13) (defining "obligor" in similar terms).

[9] *See, e.g., Natural Gas Clearinghouse v. Midgard Energy Co.*, 113 S.W.3d 400, 413-14 (Tex. App.—Amarillo 2003, pet denied); *de la Garza v. de la Garza*, 185 S.W.3d 924, 928 (Tex. App.—Dallas 2006, no pet.) (refusing application when contract did not involve an extension of credit).

[10] *Phillips Petrol. Co. v. Adams*, 513 F.2d 355, 368 (5th Cir. 1975) (quoted and adopted in *Phillips Petrol. Co. v. Stahl Petrol. Co.*, 569 S.W.2d 480, 485 (Tex. 1978)).

[11] *Heidenheimer v. Ellis*, 3 S.W. 666, 667 (Tex. 1887).

[12] *Republic Nat'l Bank of Dallas v. Northwest Nat'l Bank of Fort Worth*, 578 S.W.2d 109, 116 (Tex. 1978).

[13] TEX. REV. CIV. STAT. art. 5069-1.05, § 6 (now codified as amended at TEX. FIN. CODE §§ 304.101 *et seq.*).

[14] *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 324 (Tex. 1994).

[15] 962 S.W.2d 507, 531-33 (Tex. 1998).

[16] 962 S.W.2d at 530.

[17] *See, e.g., Aquila Southwest Pipeline, Inc. v. Harmony Expl., Inc.*, 48 S.W.3d 225, 243-44 (Tex. App.—San Antonio 2001, pet. denied) (assuming that the former "tolling for delay" provision of the PI interest statute also applied to breach of contract cases).

[18] *See, e.g., de la Garza v. de la Garza*, 185 S.W.3d 924, 928 (Tex. App.—Dallas 2006, no pet.) ("we look to the statute in effect at the time the trial court rendered judgment").

[19] *See, e.g., Brainard v. Trinity Universal Ins. Co.*, 216S.W.3d 809,812 (Tex. 2006) (declaring: "Prejudgment interest is awarded to fully compensate the injured party, not to punish the defendant.").

[20] *National Freight, Inc. v. Snyder*, 191 S.W.3d 416, 427-28 (Tex. App.—Eastland 2006, no pet.) (where award hinges on the interpretation of a single letter of undisputed existence and content, "as a practical matter, our review of the prejudgment interest issue … is de novo."); *see also Toshiba Machine Co. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 785 (Tex. App.—Fort Worth 2005, pet. granted, judgm't vacated w.r.m.); *Kenneco*, 962 S.W.2d at 531-32 (determining, as a matter of law, that tolling agreement was sufficient "notice"); *but see Morales v. Morales*, 98 S.W.3d 343, 348-49 (Tex. App.—Corpus Christi 2003, pet. denied) (deferring to trial court's discretion to determine that "notice" of claim on divorce agreement was the date of the divorce suit which preceded the agreement).

[21] *See, e.g., Citizen's Nat'l Bank v. Allen Rae Invest., Inc.*, 142 S.W.3d 459, 487 (Tex. App.—Fort Worth 2004, no pet.).

[22] *Kenneco*, 962 S.W.2d at 532.

[23] TEX. FIN. CODE § 304.003(c).

[24] *See* http://www.occc.state.tx.us/pages/int_rates/Index.html.

[25] *Kenneco*, 962 S.W.2d at 532; TEX. FIN. CODE § 304.104.

[26] *Sage Street Assoc. v. Northdale Const. Co.,* 863 S.W.2d 438, 440 (Tex. 1993).

[27] TEX. FIN. CODE § 302.001(b).

[28] *Main Place Custom Homes, Inc. v. Honaker,* 192 S.W.3d 604, 628-29 (Tex. App.—Fort Worth 2006, pet. denied); *Cresthaven Nursing Resid. v. Freeman*, 134 S.W.3d 214, 223 (Tex. App.—Amarillo 2003,

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no pet.); *Durham Transp. Co., Inc. v. Beetner*, 201 S.W.3d 859, 874 (Tex. App.—Waco 2006, pet. denied).

[29] *See Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 556 (Tex. 1985); *KMG Kanal-Muller-Grupe Deutchland GmbH & Co. KG v. Davis*, 175 S.W.3d 379, 396-97 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

[30] *See Kerr-McGee Corp. v. Helton*, 134 S.W.3d 204, 213 (Tex. App.—Amarillo 2002), *rev'd on other grounds*, 133 S.W.3d 245 (Tex. 2004). While one court held post-*Kenneco* that interest could not be awarded on future damages, outside of personal injury cases, the court did not appear to be aware of *Kenneco* and, indeed, proclaimed that when damages are awarded for economic injury rather than personal injury, the 1985 decision in *Cavnar* "still controls." *KMG Kanal-Muller-Grupe*, 175 S.W.3d at 396-97.

[31] TEX. FIN. CODE § 304.1045.

[32] *See* n. 28, *supra*.

[33] *Thompson*, 903 S.W.3d at 325; *Durham Transp. Co.*, 201 S.W.3d at 876.

[34] *Pringle v. Moon*, 158 S.W.3d 607, 611 (Tex. App.—Fort Worth 2005, no pet.).

[35] *Emerson Elec. Co. v. American Permanent Ware Co.*, 201 S.W.3d 301, 315 (Tex. App.—Dallas 2005, no pet.).

[36] *Brainard, 216 S.W.3d at 812*.

[37] *Kenneco*, 962 S.W.2d at 531.

[38] TEX. FIN. CODE § 304.104.

[39] *Kenneco*, 962 S.W.2d at 531.

[40] *National Freight*, 191 S.W.3d at 428.

[41] *Kenneco*, 962 S.W.2d at 531.

[42] *Toshiba Machine Co.*, 180 S.W.3d at 786.

[43] *Morales*, 98 S.W.3d at 349.

[44] *Excel Corp. v. Apodaca*, 51 S.W.3d 686, 701 (Tex. App.–Amarillo 2001), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002); *Stringer v. Perales*, No. 01-02-00281-CV, 2003 WL 1848594 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

[45] *See Qwest Comm. Int'l, Inc. v. AT&T Corp.*, 114 S.W.3d 15, 40 (Tex. App.—Austin 2003), *rev'd on other grounds*, 167 S.W.3d 324 (Tex. 2005).

[46] *de la Garza*, 185 S.W.3d at 928-29.

[47] *See Lee v. Lee*, 47 S.W.3d 767, 800 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (refusing to recognize exception for fiduciary who secretly paid himself unauthorized fees).

[48] *See, e.g., International Turbine v. VASP Brazilian Airlines,* 278 F.3d 494 (5th Cir. 2002) (holding that interest accrued, under Texas law, on the entire amount of the judgment, for the entire accrual period dictated by *Kenneco*, even though damages were for lease payments which had been due monthly through and after the time of trial); *Helton*, 134 S.W.3d at 212-13 (rejecting claimed exception for damages which accrued post-suit); *American Technical Res., Inc. v. Network Staffing Serv., Inc.*, No. 05-00-01124-CV, 2001 WL 969210 (Tex. App.–Dallas Aug. 28, 2001, no pet.) ("We find no support in Texas law for [defendants'] argument that prejudgment interest should be calculated on a month-by-month basis, rather than on the amount of the judgment" in a breach of contract case).

[49] *See, e.g., Young v. Qualls*, ___ S.W.3d ___, 2005 WL 2254999, at *7 (Tex. App.—Amarillo 2005), *rev'd on other grounds*, 2007 WL 1299250 (Tex. May 4, 2007).

[50] 25 S.W.3d 370 (Tex. App.—Fort Worth 2000), *rev'd*, 96 S.W.3d 207 (Tex. 2002).

[51] *Robertson v. ADJ Partnership, Ltd.*, No. 09-05-462-CV, 2006 WL 2788515, at *10 (Tex. App.—Beaumont Sept. 28, 2006, pet. stricken).

[52] *Citizen's Nat'l Bank.*, 142 S.W.3d at 487 (finding an abuse of discretion when the interest award did not use one of the two accrual dates allowed by *Kenneco*).

[53] TEX. FIN. CODE §§ 304.105, 304.106.

[54] *See Formosa Plastics Corp., USA v. Kajima Int'l, Inc.*, 216 S.W.3d 436,464-65 (Tex. App.—Corpus Christi 2006, pet. filed) (en banc) (holding that *Kenneco* did not adopt the settlement-offer tolling provisions of the Finance Code for all common-law claims); *Qwest*, 114 S.W.3d at 40-41 (assuming that the tolling provisions apply to a breach of contract action).

[55] *Qwest*, 114 S.W.3d at 40-41.

[56] *Denta Rama, Inc. v. Lavastone Indus. of Cen. Tex., Inc.*, 597 S.W.2d 507, 509 (Tex. App.—Dallas 1980, no writ).

[57] *Id.*

[58] *See Republic Underwriters Ins. Co. v. Mex-Tex Inc.*, 150 S.W.3d 423 (Tex. 2004) (adopting this rule for the payment of insurance claims under the Insurance Code's prompt-payment provisions).

[59] TEX. FIN. CODE § 304.108 (Vernon 1998).

[60] *Matthews v. DeSoto*, 721 S.W.2d 286, 287 (Tex.1986); *Morgan v. Ebby Halliday Real Estate, Inc.,* 873 S.W.2d 385, 388 (Tex. App—Fort Worth 1993, no pet.).

[61] *Kenneco*, 962 S.W.2d at 531; *Ellis v. City of Dallas*, 111 S.W.3d 161, 168 (Tex. App.—Eastland 2003, no pet.) (holding that a standstill agreement tolled the accrual of interest, when it did not provide otherwise).

[62] 962 S.W.2d at 531.

[63] *See, e.g., de la Garza*, 185 S.W.3d at 928; *Natural Gas Clearinghouse*, 113 S.W.3d at 414.

[64] *See Owens-Illinois, Inc. v. Estate of Burt,* 897 S.W.2d 765, 768 (Tex. 1995) (holding original PI interest statute inapplicable to cases filed before its effective date, based on language of statute's implementing act).

[65] *See, e.g., Durham Transp.*, 201 S.W.3d at 874-75.

[66] *Id.*

[67] *See Columbia Med. Ctr. of Las Colinas v. Bush*, 122 S.W.3d 835, 865-66 (Tex. App.—Ft. Worth 2003, pet. denied); *City of Dallas v. Redbird Dev. Corp.*, 143 S.W.3d 375, 388-89 (Tex. App.—Dallas 2004, no pet. hist.); *In re Kajima Int'l*, 139 S.W.3d 107, 117 (Tex. App.—Corpus Christi 2004, no pet.); *Sibley v. RMA Partners, L.P.*, 138 S.W.3d 455, 459-60 (Tex. App.—Beaumont 2004, no pet.); *Bennett v. Cochran*, No. 14-00-01160-CV, 2004 WL 852298, at *7-8

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(Tex. App.—Houston [14th Dist.] April 22, 2004, no pet.); *Burke v. Union Pac. Res. Co.*, 138 S.W.3d 46, 74 (Tex. App.—Texarkana 2004, pet. denied); *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671, 688 (Tex. App.—Dallas 2004, pet. granted); *Utts v. Short*, No. 03-03-00512-CV, 2004 WL 635342, at *5-6 (Tex. App—Austin April 1, 2004, pet. denied).

[68] TEX. FIN. CODE § 304.007.

[69] *Ewing v. William L. Foley, Inc.*, 280 S.W. 499, 503-04 (Tex. 1926).

[70] *See, e.g., National Freight*, 191 S.W.3d at 427 ("the abuse of discretion standard applies to the trial court's factual findings as they relate to prejudgment interest"); *Travelers Ins. Co. v. Wilson*, 28 S. W.3d 42, 47 (Tex. App.—Texarkana 2000, no pet.) (although "as a normal course of business the court would make the prejudgment interest determination," it was not reversible error for interest to be included in the jury findings).

[71] *Oyster Creek Fin. Corp. v. Richmond Invest. II, Inc.*, 176 S.W.3d 307, 325-26 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

[72] *Id.* at 320.

[73] *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.,* 966 S.W.2d 451, 461-63 (Tex. 1998); TEX. NAT. RES. CODE §§ 91.402(b), 91.403(b).

[74] *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 124 (Tex. App.—Corpus Christi 1999, pet. denied) ("[U]nder all of the authorities, the interest contracted for is a part of the debt, as much as the principal."); *First Nat'l Bank v. J.I. Campbell Co.*, 114 S.W. 887, 890 (Tex. Civ. App.—1908, no writ) (same).

[75] Application of the quasi-statutory scheme would result in a material abrogation of the right to contract for non-usurious interest, for no good reason. Presumably, for example, no court would balk at enforcing a contractual agreement to pay interest of 1% per month, compounded monthly, starting on the date of default. Yet the PI interest statute and *Kenneco* dictate that prejudgment interest accrues only as simple interest, and does not begin to accrue until a time which could be months or years after the default. Since application of these limits to standard credit transactions would be absurd, and likely wreak havoc on the availability of credit in this state, there is no rational basis for applying any aspect of *Kenneco* to contractual interest rates.

[76] 15 S.W.3d 124, 141 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

[77] *Id.*

[78] *Id.*

[79] *See Miner-Dederick Constr. Corp. v. Mid-County Rental Serv., Inc.*, 603 S.W.2d 193, 200 (Tex. 1980) (affirming interest award accrued from date contractor completed extra work at issue).

[80] *Pegasus Energy*, 3 S.W.3d at 123-25.

[81] *Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises,* 625 S.W.2d 295, 298-300 (Tex. 1981).

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