# **COMMENT: INTERESTING INEQUITIES: BRINGING SYMMETRY AND CERTAINTY TO PREJUDGMENT INTEREST LAW IN TEXAS** [[1]](#footnote-2)\*

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**[\*232]**

I. Introduction

Prejudgment interest is the amount of money added to a judgment to ensure that a damage award reflects the time value of money. Because of the inherent delays involved in bringing civil actions to final judgment, the issue of prejudgment interest is routinely litigated. Nevertheless, despite the wealth of case law that has resulted from this vast amount of litigation, Texas courts have yet to develop a methodical approach for calculating prejudgment interest.

The modern era of Texas prejudgment interest law was ushered in by Cavnar v. Quality Control Parking, Inc., [[2]](#footnote-3)1 when the Texas Supreme Court held that prejudgment interest must be awarded at the prevailing rate at the time of judgment, compounded daily. [[3]](#footnote-4)2 Following this decision, the Texas Legislature amended the applicable state prejudgment interest statute to reflect Cavnar, thereby mandating prejudgment interest awards in all wrongful death, personal injury, and property damage cases. [[4]](#footnote-5)3

Following this amendment, the Supreme Court went one step further by awarding prejudgment interest at the rate of ten percent per annum, compounded daily, in a breach of contract action. [[5]](#footnote-6)4 Since that decision, both state and federal courts have written numerous opinions attempting to properly explain

**[\*233]** and integrate Texas prejudgment interest common law and statutory law. [[6]](#footnote-7)5 Notwithstanding valiant efforts by the courts, the result has been a surprising lack of synergy throughout the judiciary on this legal issue.

To alleviate the current state of unpredictability concerning prejudgment interest and to ensure symmetry throughout this area of the law, it seems incumbent upon the state legislature to further amend article 5069-1.05. Such an amendment should require the awarding of prejudgment interest in pure economic loss tort actions. In addition, the amendment should specifically define the accrual period, the compounding period, and the rate of interest. Every civil action involving money damages includes a prejudgment interest issue. It is time, therefore, for the state legislature to provide a definitive formula for calculating such interest.

II. Terminology

Prior to discussing the evolution and current state of prejudgment interest law in Texas, it is important to develop an understanding of some basic terminology associated with this area of the law. Interest is defined as "the sum paid or payable for the use or detention of money." [[7]](#footnote-8)6 It has also been defined in Texas as "the compensation allowed by law for the use or forbearance or detention of money." [[8]](#footnote-9)7 Finally, interest has been defined as the "right to have the advantage accruing from anything." [[9]](#footnote-10)8 These equitable sounding definitions allow interest to be seen as a legitimate basis for an award of additional damages in civil actions, rather than as a mere "indicator of greed." [[10]](#footnote-11)9

There are several general distinctions that serve to categorize various types of interest. For instance, conventional interest is the rate agreed upon by the parties to a transaction. [[11]](#footnote-12)10

**[\*234]** Legal interest, on the other hand, is interest that is prescribed by law. [[12]](#footnote-13)11 Prejudgment interest is interest calculated on the sum payable to the plaintiff from the time of his loss or injury to the time of judgment. [[13]](#footnote-14)12 Finally, other terms such as simple interest and compound interest describe the particular method by which the interest will accrue. [[14]](#footnote-15)13 Although technical, these distinctions often have a tremendous effect on the size of judgment awards. This potential effect requires trial lawyers and judges to develop an understanding of the various forms and types of interest to ensure that interest is properly applied in actions involving monetary damage awards.

III. A General History of Prejudgment Interest [[15]](#footnote-16)14

A. Common-Law Distinctions

1. Interest Eo Nomine versus Interest as Damages. In years past, Anglo-American courts were not willing to award prejudgment interest. [[16]](#footnote-17)15 Two principal wording distinctions played key roles in creating this judicial resistance to prejudgment interest awards. The first of these distinctions was the categorization of interest as either interest "eo nomine" or interest "as damages." [[17]](#footnote-18)16 Interest eo nomine is the term used to

**[\*235]** describe interest awarded as compensation for the use or detention of money. [[18]](#footnote-19)17 Interest as damages, on the other hand, is considered part of the amount in controversy. [[19]](#footnote-20)18

Under early Texas common law, prejudgment interest eo nomine could not be awarded absent either an express agreement by the parties or a statutory provision allowing such an award. [[20]](#footnote-21)19 Interest as damages could, however, be awarded when necessary to indemnify a party for an injury, regardless of whether a statutory provision required such an award. [[21]](#footnote-22)20 Eventually, the Texas Supreme Court rendered this distinction obsolete in Phillips Petroleum Co. v. Stahl Petroleum Co. [[22]](#footnote-23)21 Phillips Petroleum nullified the eo nomine-as damages distinction and opened the door for allowing prejudgment interest awards solely as a means of fully compensating injured plaintiffs. [[23]](#footnote-24)22

2. The Liquidated versus Unliquidated Damages Distinction. Another former preclusion to the awarding of prejudgment interest in certain cases was the distinction between liquidated and unliquidated damages. This common-law distinction provided that when the plaintiff's damages were "fixed, certain, or readily ascertainable by computation or a generally recognized standard," [[24]](#footnote-25)23 the damages were liquidated. In cases involving uncertain damage amounts, the damages were considered unliquidated. [[25]](#footnote-26)24

Prior to applying the liquidated-unliquidated distinction, however, many courts first asked whether the action sounded

**[\*236]** in tort or contract. [[26]](#footnote-27)25 If the action was in tort, courts that followed the tort-contract distinction automatically refused to award prejudgment interest regardless of whether the damages were liquidated or unliquidated. [[27]](#footnote-28)26 If the action was in contract, courts then applied the liquidated-unliquidated distinction and awarded prejudgment interest only if the amount in question was liquidated. [[28]](#footnote-29)27

Application of the liquidated-unliquidated distinction was based on the notion that defendants who knowingly detain money owed to a plaintiff should pay a penalty for the wrongful detention of that money. [[29]](#footnote-30)28 Courts reasoned, however, that only those defendants who could determine exactly what amounts were owed could be guilty of improperly withholding money. [[30]](#footnote-31)29 This rationale implied that a defendant who either had a valid defense or who contested the amount due would not be categorized as wrongfully withholding money. [[31]](#footnote-32)30

The liquidated-unliquidated dichotomy was an extremely complex and confusing factor in the determination of whether an award of prejudgment interest was proper. [[32]](#footnote-33)31 Courts and commentators criticized the liquidated-unliquidated distinction because it created unnecessary difficulties in litigation and resulted in inconsistent rulings. [[33]](#footnote-34)32 Courts construing Texas law found this criticism persuasive and consequently abandoned the liquidated-unliquidated distinction. [[34]](#footnote-35)33 This abandonment

**[\*237]** served as the primary catalyst for allowing prejudgment interest awards in contract and economic loss tort actions in Texas.

B. The Modern Era of Prejudgment Interest in Texas Courts

Texas courts, like other Anglo-American courts, did not begin awarding prejudgment interest as a matter of equity until the late nineteenth century. [[35]](#footnote-36)34 Since that time, prejudgment interest has become recognized as an integral element of the law of damages, [[36]](#footnote-37)35 and Texas has greatly expanded these interest awards through a series of statutes and court decisions. [[37]](#footnote-38)36 Great disparity has developed, however, leaving a history of Texas case law that fails to speak with a unified voice on this issue. [[38]](#footnote-39)37

One of the most important nineteenth century Texas Supreme Court cases to deal squarely with the issue of prejudgment interest in a noncontractual case is Watkins v. Junker. [[39]](#footnote-40)38 In Watkins, the court disallowed prejudgment interest in a personal injury case because of the unliquidated nature of personal injury damages and the considerable latitude given to the jury in determining the amount of recovery. [[40]](#footnote-41)39 Lower Texas courts later adopted this rationale, resulting in the routine denial of prejudgment interest in personal injury and similar cases. [[41]](#footnote-42)40

Watkins remained the law in Texas for nearly ninety years

**[\*238]** until the Texas Supreme Court, in Cavnar v. Quality Control Parking, Inc., finally decided that prevailing plaintiffs in personal injury, wrongful death, and survival actions should recover prejudgment interest. [[42]](#footnote-43)41 The Cavnar court relied on several bases for awarding prejudgment interest, [[43]](#footnote-44)42 most of which are applicable to contract and tort actions. Because of Cavnar's apparently broad application, some courts view this decision as establishing a uniform standard that should be applied mechanically in all cases in which the amount of interest is not controlled by statute. [[44]](#footnote-45)43 Other courts hold that the underlying rationale espoused in Cavnar should apply generally to numerous sorts of contract and tort actions. [[45]](#footnote-46)44

The case that extended the Cavnar holding to contract and nonpersonal injury tort actions was Perry Roofing Co. v. Olcott. [[46]](#footnote-47)45 The Texas Supreme Court's formal approval of the extension of Cavnar's principles to a commercial case in Perry Roofing [[47]](#footnote-48)46 alleviated any remaining uncertainty as to Cavnar's full breadth. [[48]](#footnote-49)47 Consequently, the Fifth Circuit quickly adopted the Texas Supreme Court's extension of Cavnar to the commercial context. [[49]](#footnote-50)48

**[\*239]**

The other critical event in the development of current Texas prejudgment interest law occurred when the state legislature, as part of the 1987 tort reform package, passed an amendment to article 5069-1.05 of the Texas Civil Statutes [[50]](#footnote-51)49 that appeared to be a direct statutory response to the ruling in Cavnar. [[51]](#footnote-52)50 Section 6 of the amendment specifically mandated prejudgment interest awards in wrongful death, personal injury, and property damage cases, [[52]](#footnote-53)51 but failed to allow prejudgment interest awards explicitly in contract and pure economic loss cases. Consequently, the full scope of both article 50691.05 and Cavnar remains unclear. [[53]](#footnote-54)52

IV. Purposes of Prejudgment Interest

There are several justifications for awarding prejudgment interest to prevailing plaintiffs, none of which seems exclusive to personal injury cases. These include: (1) compensation of the plaintiff, [[54]](#footnote-55)53 (2) prevention of unjust enrichment of the defendant, [[55]](#footnote-56)54 and (3) expedition of the settlement process. [[56]](#footnote-57)55 While

**[\*240]** these purposes clearly apply to personal injury cases, the desire for fairness and overall justice that provides the thrust behind these arguments is equally applicable to all types of cases, including pure economic loss tort actions. [[57]](#footnote-58)56

Of these purposes, plaintiff compensation is the most compelling reason for awarding prejudgment interest. [[58]](#footnote-59)57 Plaintiff compensation theory advocates making plaintiffs whole by restoring them to the position they occupied prior to the injury. [[59]](#footnote-60)58 To fully effectuate this goal, this theory recognizes that the income-producing ability of money must be considered. [[60]](#footnote-61)59 When a court refuses to award prejudgment interest, prevailing plaintiffs are denied investment opportunities and resulting revenue. [[61]](#footnote-62)60 This creates an inequitable result between plaintiffs who recover the day following their injury and those who must litigate to recover damages. [[62]](#footnote-63)61 Prejudgment interest, in essence, adjusts time-of-accident dollars into time-of-judgment dollars, thus ensuring full compensation. [[63]](#footnote-64)62

The second theory, prevention of the unjust enrichment of defendants, also focuses on the time value of money. [[64]](#footnote-65)63 Advocates of this theory argue that defendants who retain use of damage money during periods of litigation unjustly benefit from that use. [[65]](#footnote-66)64 These advocates argue that defendants are

**[\*241]** paying "yesterday's debt with tomorrow's dollars." [[66]](#footnote-67)65

The restitution theory presumes that defendants achieve positive gains by investing unpaid damage award funds prior to judgment. The potential value of the use of these funds is imputed to the defendant regardless of whether this value is actually recognized. [[67]](#footnote-68)66 This imputed value concept has been criticized because of its punitive effect, but it provides an objective standard that may be more easily applied by the courts. [[68]](#footnote-69)67 Consequently, various Texas courts have embraced the restitution theory and have noted the unfair financial advantage that results from the use of damage awards prior to the date of judgment. [[69]](#footnote-70)68

The final purpose associated with prejudgment interest focuses upon the encouragement of quick settlements and the prevention of trial delays. [[70]](#footnote-71)69 Proponents of prejudgment interest awards argue that insurers and defendants profit greatly by delay. [[71]](#footnote-72)70 They also argue that other rules, such as statutes of limitation and the doctrine of laches, prevent similar delays by plaintiffs. [[72]](#footnote-73)71 Opponents contend, however, that prejudgment interest requires defendants to place a value on their cases and to suffer severe penalties if they guess incorrectly. [[73]](#footnote-74)72 They also argue that the incidental effect of trimming court dockets that results from routinely awarding prejudgment interest is not an effective solution to the judicial backlog dilemma. [[74]](#footnote-75)73

Opponents of prejudgment interest awards posit other arguments. There are five common objections to prejudgment

**[\*242]** interest awards: (1) juries increase awards to compensate for delays, (2) prejudgment interest unfairly penalizes defendants who are victims of unavoidable court delays, (3) plaintiffs who expect prejudgment interest awards are encouraged to delay, (4) prejudgment interest is detrimental to commerce, and (5) prejudgment interest causes increases in liability insurance rates. [[75]](#footnote-76)74

However, all of these arguments against prejudgment interest make no distinction between personal injury and nonpersonal injury cases. Consequently, to successfully refute these criticisms on their merits, they must be refuted as to all types of cases. Likewise, if these are valid arguments against prejudgment interest awards in personal injury cases, they should be equally valid in other cases as well. Thus, if prejudgment interest is routinely awarded in wrongful death, personal injury, and property damage actions, it is logical that courts should also award it in pure economic loss actions.

V. Bases for Awarding Prejudgment Interest

A. General Overview

Two primary bases exist for awarding prejudgment interest--enabling statutes and general equitable principles. [[76]](#footnote-77)75 Texas has two statutory provisions that provide for prejudgment interest. [[77]](#footnote-78)76 The first, article 5069-1.03, applies to contracts involving ascertainable or liquidated sums in which no specified interest rate has been agreed upon by the parties. [[78]](#footnote-79)77 The courts have narrowly interpreted article 5069-1.03 and typically apply it only when the damage amount is unambiguously

**[\*243]** established by the underlying contract upon which liability is based. [[79]](#footnote-80)78

The second statute that covers, inter alia, prejudgment interest, is article 5069-1.05. [[80]](#footnote-81)79 This statute was amended in 1987 in response to the Texas Supreme Court's decision in Cavnar [[81]](#footnote-82)80 and now includes a section mandating prejudgment interest awards in wrongful death, personal injury, and property damage actions, but is silent regarding prejudgment interest awards in commercial cases. [[82]](#footnote-83)81 However, the full scope of this statute, particularly section 6, remains unclear. [[83]](#footnote-84)82 Consequently, whether article 5069-1.05 should be read as applying only to wrongful death, personal injury, and property damage is an important question that has not yet been resolved by courts applying Texas law. [[84]](#footnote-85)83

In addition to this statutory basis, general principles of equity are also frequently cited as a justification for prejudgment interest awards. This basis stems from the late nineteenth century Texas Supreme Court case, Heidenheimer v. Ellis, [[85]](#footnote-86)84 in which the court awarded prejudgment interest to ensure complete indemnification of the injured plaintiff. [[86]](#footnote-87)85 That decision provided the foundation for equity to serve as a viable basis for awarding prejudgment interest through the end of the nineteenth century and into the twentieth century. [[87]](#footnote-88)86

**[\*244]**

Most courts, when faced with both an equitable and a statutory basis for awarding prejudgment interest, rely on the statutory basis. However, in at least one Fifth Circuit decision, the opposite view was taken, thus allowing a prejudgment interest award based in equity despite the existence of an applicable statute. [[88]](#footnote-89)87 Under this rationale, a court may apply an interest rate that is higher than the rate specified in an applicable statute. [[89]](#footnote-90)88 Additionally, this reasoning indicates that an equity basis for prejudgment interest is capable of trumping a statutory basis.

In Cavnar, the Texas Supreme Court reaffirmed the validity of equity as a viable basis for awarding prejudgment interest, even in the face of an express statutory provision. [[90]](#footnote-91)89 This decision has therefore served as the foundation for tremendous

**[\*245]** expansion of the equity basis by the courts, [[91]](#footnote-92)90 which unfortunately has also led to a myriad of rules and exceptions. [[92]](#footnote-93)91

B. An Analysis of Article 5069-1.03

As stated earlier, article 5069-1.03 applies to contracts involving ascertainable sums. [[93]](#footnote-94)92 Courts have differed, however, on the precise definition of ascertainable sum and consequently on when article 5069-1.03 applies. The first case to interpret this statute was Federal Life Insurance Co. v. Kriton. [[94]](#footnote-95)93 In that case, the Texas Commission of Appeals held that it was unnecessary for the contract to establish a definite amount owed as of a certain date to fall within the meaning of the statute. [[95]](#footnote-96)94 Instead, the Kriton court held that it was sufficient if the contract states the conditions upon which liability turns. [[96]](#footnote-97)95 This interpretation indicates that if the contract simply provides for the measure of liability, article 5069-1.03 will likely govern. [[97]](#footnote-98)96

Other courts, however, prefer to interpret this statute much more narrowly. These courts appear to be leaning away

**[\*246]** from the liberal Kriton test and are applying a more restrictive test that requires the exact amount of damages to be ascertainable from the face of the contract. [[98]](#footnote-99)97 Nevertheless, even courts favoring this narrow interpretation of ascertainable sum still disagree as to just how narrowly that term should be read. While some courts require only that the amount of damages stemming from a breached contract be reasonably certain, [[99]](#footnote-100)98 other courts require absolute certainty. [[100]](#footnote-101)99

A strict interpretation of ascertainable sums payable is preferable for the simple reason that a more liberal interpretation would result in inconsistent, unpredictable rulings. [[101]](#footnote-102)100 Such uncertainty may decrease the chance of settlements because the true value of the injury suffered, as well as the economic value of the lawsuit, are less certain. Applying article 5069-1.03 and its express prejudgment interest rate of six percent only when the contract clearly states the amount of

**[\*247]** damages to ensue from a breach will likely encourage better drafting during the filing stage and a better settlement climate during the litigation stage. In all other cases, article 5069-1.05, or a revised, more inclusive version of that statute, should be applied.

C. An Analysis of Article 5069-1.05

The degree of disparity concerning the proper interpretation of article 5069-1.03 pales in comparison to the existing disparity regarding the proper interpretation and application of article 5069-1.05. This statute was amended in 1987 to include a special provision mandating prejudgment interest awards in wrongful death, personal injury, and property damage actions. [[102]](#footnote-103)101 That amendment also requires computation of simple rather than compound interest. [[103]](#footnote-104)102

The 1987 amendment to article 5069-1.05, while helpful in laying a foundation for this area of law, has left some questions unanswered--such as whether courts may still award prejudgment interest in pure economic tort cases. [[104]](#footnote-105)103 Plausible arguments can be made on either side of this issue, and the courts have differed as to which is correct.

Several courts have chosen to read article 5069-1.05 very narrowly, thereby constraining the statute's application to wrongful death, personal injury, and property damage cases exclusively. [[105]](#footnote-106)104 Other courts have, however, interpreted article

**[\*248]** 5069-1.05 broadly and have noted that it should apply to a wide array of cases. [[106]](#footnote-107)105 These courts view article 5069-1.05 as a default basis for awarding prejudgment interest whenever article 5069-1.03 is inapplicable. [[107]](#footnote-108)106

Two other intriguing aspects of article 5069-1.05 involve the routine correlation of article 5069-1.05 with general principles of equity, [[108]](#footnote-109)107 and the common application of article 50691.05 section 2 to both prejudgment and postjudgment interest. [[109]](#footnote-110)108 Perhaps the most important issue, however, is the ef- **[\*249]** fect of the amended version of article 5069-1.05 on Cavnar and its progeny.

In Crocker National Bank v. Ideco Division of Dresser Industries, Inc., [[110]](#footnote-111)109 U.S. District Judge Lynn Hughes expressed a strong belief that the 1987 amendment to article 5069-1.05 "undercut" Cavnar. [[111]](#footnote-112)110 Unfortunately, this rationale has the overwhelming tendency to negate any statutory or specific common-law basis for awarding prejudgment interest in commercial disputes. [[112]](#footnote-113)111 The end result, therefore, is to award prejudgment interest in commercial disputes solely upon equitable rather than statutory or specific common-law grounds. [[113]](#footnote-114)112 However, continued reliance by much of the judiciary on Cavnar and its progeny, as well as the equitable principles contained within this line of cases, indicate that many courts believe these decisions remain unchanged by statutory amendments to article 5069-1.05. [[114]](#footnote-115)113

This clear disparity in opinions concerning the viability of Cavnar, especially considering the opinion of the federal bench in Crocker National Bank, pointedly illustrates the need for further amendment of article 5069-1.05. Such an amendment should expressly mandate awarding prejudgment interest in pure economic loss tort cases. Leaving prejudgment interest awards in commercial cases solely to the equitable discretion of

**[\*250]** the courts risks uncertainty and inequity. Fixed statutory guidelines like those in article 5069-1.05, section 6 [[115]](#footnote-116)114 allow equitable results and lay a conducive settlement framework. Similar guidelines in the commercial area will almost certainly create the same effect.

VI. Calculating the Proper Prejudgment Interest Award

A. Selecting the Appropriate Interest Rate

1. Types of Rates. Depending on the type of action, prejudgment interest may be awarded at one of several interest rates. As expected, the specific rate that is applied may significantly affect the final judgment award. [[116]](#footnote-117)115 One key aspect of different types of interest rates concerns whether those rates are fixed or floating. [[117]](#footnote-118)116 Floating rates vary with market fluctuations, [[118]](#footnote-119)117 while fixed rates are specifically delineated in applicable interest statutes. [[119]](#footnote-120)118

Although floating rates are fairly common in the marketplace, fixed rates work well in the legal environment because they are easy to apply and their certainty assists settlement negotiations. [[120]](#footnote-121)119 However, with these advantages come

**[\*251]** inflexibility and inequity. [[121]](#footnote-122)120 Fixed rates threaten to either over or undercompensate prevailing plaintiffs depending on the rate's correlation with prevailing market rates. [[122]](#footnote-123)121 Similarly, fixed rates that vary significantly from prevailing rates create incentives to delay and to refrain from settlement negotiations. [[123]](#footnote-124)122

In contrast to fixed rates, floating interest rates correspond with current market rates and thereby ensure full and fair compensation for prevailing plaintiffs. [[124]](#footnote-125)123 Proponents of floating rates believe that they permit judges and juries to fairly and efficiently compensate plaintiffs for the delay and loss of purchasing power incurred prior to judgment. [[125]](#footnote-126)124 Proponents also argue that floating rates recognize that interest rates can fluctuate dramatically over time [[126]](#footnote-127)125 and that floating rates

**[\*252]** automatically reflect these fluctuations without further legislative action or approval. [[127]](#footnote-128)126

2. Cavnar's Effect on the Common-Law Prejudgment Interest Rate. Assuming that a floating rate approach is adopted, the appropriate floating index and rate to be applied remain open questions. [[128]](#footnote-129)127 Texas courts have historically awarded different interest rates, resulting in uncertain and erratic case law. [[129]](#footnote-130)128 This uncertainty was supposedly clarified when the Texas Supreme Court delineated a prejudgment interest rate formula in Cavnar. The Cavnar court awarded prejudgment interest at a rate of ten percent, which was equivalent to the prevailing rate existing at the time of judgment. [[130]](#footnote-131)129 The court reached this rate by interpreting the wording of article 50691.05, section 2, which calculates the interest rate based upon the rate published by the consumer credit commissioner in the Texas Register. [[131]](#footnote-132)130 Unfortunately, although subsequent courts recognized the binding effect of Cavnar, [[132]](#footnote-133)131 many have adopted Cavnar's ten percent rate, rather than Cavnar's rule for determining what prejudgment interest rate should be used. [[133]](#footnote-134)132 This has essentially resulted in a fixed common-law

**[\*253]** rate of ten percent despite the flexible rate espoused by the court in Cavnar. [[134]](#footnote-135)133

3. The Argument for Adopting and Uniformly Applying a Single Interest Rate Index. The appropriate interest rate should be based on a readily identifiable commercial index that represents what a reasonably prudent investor can earn in the marketplace. [[135]](#footnote-136)134 Commentators believe that several indexes accurately represent this rate. [[136]](#footnote-137)135 Some commentators, however, propose a system that allows the trier of fact to establish the appropriate prejudgment interest rate based on the plaintiff's investment history. [[137]](#footnote-138)136 This approach is based in equity [[138]](#footnote-139)137

**[\*254]** and seeks to award prevailing plaintiffs the precise amount they would have actually earned had they personally invested the funds. [[139]](#footnote-140)138 Consequently, this type of discretionary method would allow savvy investors to receive higher prejudgment interest rates than those who have poor investment histories.

Such an approach, though perhaps more adept at ensuring full compensation for each prevailing plaintiff, risks creating tremendous disparity among individuals who suffer similar injuries, but who have differing investment skills. Rewarding or punishing injured plaintiffs based on investment ability seems a wholly inept method of achieving symmetry and universal equity in the law. [[140]](#footnote-141)139 This method also presents further uncertainty and expense in the settlement process because parties must first establish past investment profiles before calculating realistic potential judgment awards.

For these reasons a single, readily identifiable index is most appropriate. The floating index adopted by article 50691.05 should be expressly expanded to apply to contract and economic loss tort actions involving unascertainable sums of damages. Application of the same index already used in wrongful death, personal injury, and property damage actions would provide symmetry and certainty throughout the law. [[141]](#footnote-142)140

**[\*255]**

The legislature should not, however, place a minimum and maximum level on the adopted floating index rate. [[142]](#footnote-143)141 The twin goals of ensuring full compensation and avoiding punishment of the defendant [[143]](#footnote-144)142 can only be met if the plaintiff is awarded interest at the market rate, regardless of what that rate may be. Any rate that deviates from the market rate will do further damage by hindering the settlement process, because either the plaintiff or the defendant will stand to profit from delay.

B. The Need for Compounding

A second issue concerning the proper interest rate is whether the interest should be compounded and, if so, to what degree. Simple interest involves earning interest only on the amount of principal. [[144]](#footnote-145)143 Compound interest, on the other hand, is calculated on the principal plus the previously earned interest. [[145]](#footnote-146)144 As one might expect, compounding can result in significant additional interest revenue and expense, especially when a sizeable principal is involved. [[146]](#footnote-147)145

**[\*256]**

While many believe that compound interest has positive effects, such as expediting the pretrial and trial processes, [[147]](#footnote-148)146 others view compounding as a means of punishing the defendant and creating uncertainty. [[148]](#footnote-149)147 Proponents of compounding

**[\*257]** counter these arguments by noting the common usage of compounding by financial institutions throughout the country. [[149]](#footnote-150)148

Even though arguments favoring compounding are convincing, the question remains as to how often compounding should occur. The decision to compound prejudgment interest on a daily basis was first adopted in Cavnar. [[150]](#footnote-151)149 Because daily compounding can result in substantially higher interest awards than annual compounding, later courts disagreed over whether the decision in Cavnar mandated, or simply allowed, compounding on a daily basis. [[151]](#footnote-152)150 Regardless of the court's true intent, however, numerous federal and state courts have chosen to apply the daily compounding approach first employed in Cavnar. [[152]](#footnote-153)151

**[\*258]**

Nevertheless, several fairly recent court decisions have applied the annual compounding method prescribed in article 5069-1.05, section 2. [[153]](#footnote-154)152 Judge Hughes's opinion in Crocker National Bank, [[154]](#footnote-155)153 on the other hand, questions the legal propriety of awarding anything other than simple interest in wrongful death, personal injury, and property damages actions. Because Judge Hughes stated that the 1987 amendment to article 5069-1.05 undercut the ruling in Cavnar, [[155]](#footnote-156)154 he apparently viewed compounding as justifiable only in equity when article 5069-1.05 does not apply and only when necessary to fully compensate the injured party. [[156]](#footnote-157)155 Given the continued reliance by many courts on Cavnar to justify daily compounding of prejudgment interest, the occasional use of article 5069-1.05, section 2 by some courts to compound prejudgment interest annually, and the decision by at least one federal court not to compound interest at all, it is visibly apparent that some statutory change is necessary to provide uniformity and certainty to this area of law.

Achieving full compensation and avoiding delay entails placing injured parties in the precise position they would have been in had they never suffered the injury. [[157]](#footnote-158)156 This necessarily requires the damage award to resemble closely the amount of funds that a reasonable investor would have accumulated had that person enjoyed full use of the damage award from the date of the injury. [[158]](#footnote-159)157 Mirroring common investment returns is the only method for achieving these results. Given

**[\*259]** that compounding is the predominant method of calculating interest in the marketplace, [[159]](#footnote-160)158 it logically follows that courts must compound interest to fully compensate plaintiffs.

The appropriate degree to which the compounding should occur remains a difficult question. Given the enormous number of investment instruments in the marketplace, it is not easy to identify readily which compounding period is representative of the financial market as a whole. Based on the Internal Revenue Service's use of daily compounding on interest associated with delinquent tax payments, [[160]](#footnote-161)159 however, it seems logical to adopt that same compounding period.

C. Determining the Proper Accrual Period

Determining the period for which prejudgment interest accrues is another major issue that significantly affects the total amount of interest added to a judgment. [[161]](#footnote-162)160 One approach is to accrue interest from the date of injury. A second is to accrue interest only from the date the plaintiff files a claim. A third option is to award interest from some arbitrary judicially or legislatively imposed date that is associated with, but different from, the actual date of injury.

Before Cavnar, the well-settled rule in Texas was to award interest from the date of injury in all cases involving a fixed or ascertainable recovery amount. [[162]](#footnote-163)161 Several commentators believe this approach is the only method that fully compensates injured plaintiffs and advocate its use in cases in which the amount of recovery is not ascertainable at the time of injury. [[163]](#footnote-164)162

On the other hand, those favoring an accrual period that does not begin until the plaintiff files a complaint argue that accruing interest from the date of injury is unfair to defendants. [[164]](#footnote-165)163 This unfairness, they reason, results from allowing

**[\*260]** the party who has the power to begin the legal process to dictate how much prejudgment interest will accumulate. [[165]](#footnote-166)164 In addition, allowing accrual from the date of injury prevents defendants from setting aside sufficient reserves to cover potential judgments because they may not be aware of a potential suit for months or even years after the injury has occurred. [[166]](#footnote-167)165

Despite these prodefendant arguments favoring the accrual of interest from the date of filing, this method has many drawbacks. Primarily, it precludes full compensation to the plaintiff because the date of filing may bear little relationship to the time at which the plaintiff was entitled to compensation. [[167]](#footnote-168)166 On a more administrative side, some commentators fear that postponing accrual until the date of filing will result in hastily filed and poorly crafted pleadings. [[168]](#footnote-169)167 It could also result in unnecessary filings simply because plaintiffs may file suit before fully assessing the merits of their cases. [[169]](#footnote-170)168

The third approach involves accruing interest from some fixed period subsequent to the date of injury. The court in Cavnar adopted this approach and chose to begin the accrual period in wrongful death and personal injury actions six months after the date of injury. [[170]](#footnote-171)169 It adopted this approach because of the intermittent nature of damages. [[171]](#footnote-172)170 While this type of approach attempts to ensure that plaintiffs are neither over- nor undercompensated, it is wholly arbitrary. [[172]](#footnote-173)171

**[\*261]**

The question now arises as to the general applicability of Cavnar's arbitrary "six month rule," [[173]](#footnote-174)172 as well as the applicability of article 5069-1.05's "180 day rule" [[174]](#footnote-175)173 to pure economic loss tort actions and to contract actions involving unascertainable damage amounts. Although some courts have chosen to extend Cavnar's accrual method to contract actions, [[175]](#footnote-176)174 more courts have refused to extend it to pure economic loss tort and contract actions. [[176]](#footnote-177)175

Unfortunately, the Texas Legislature, in its two primary prejudgment interest statutes, [[177]](#footnote-178)176 failed to clarify the accrual issue and instead adopted hybrid rules that combine a portion of all three approaches. Under article 5069-1.03, for example, the interest accrual period commences on the thirtieth day after loss occurs. [[178]](#footnote-179)177 In article 5069-1.05, on the other hand, the accrual period does not begin until the date the suit is filed or until the 180th day after the defendant receives notice of the claim, whichever occurs first. [[179]](#footnote-180)178

Invoking any sort of accrual delay period, even one as brief as the one imposed by article 5069-1.03, runs contrary to the primary goal of prejudgment interest--full compensation of injured plaintiffs. Given an adoption of an interest rate that is representative of current market rates, defendants will not be punished by a delay in notification of a lawsuit because they will be able to invest their assets at the same rate at which

**[\*262]** prejudgment interest will be accrued. [[180]](#footnote-181)179 Defendants will simply be required to pay the full amount that is earned between the date of injury and the date of judgment. Consequently, they will neither profit from, nor be punished by, the lapse between injury and notification. [[181]](#footnote-182)180 Likewise, plaintiffs will be neither over- nor undercompensated, but simply fully compensated.

D. Applicability of Prejudgment Interest to Future and Punitive Damages

It would seem that the very nature of prejudgment interest should logically preclude its application to future damages. Interest cannot accumulate on unaccrued amounts, [[182]](#footnote-183)181 and future damages, by definition, are unaccrued. [[183]](#footnote-184)182 Therefore, awarding prejudgment interest on future damages would necessarily overcompensate plaintiffs and simultaneously punish defendants. [[184]](#footnote-185)183

Despite the intellectual attraction and logic of this reasoning, the Texas Supreme Court has very recently held that, because of the precise wording of article 5069-1.05, section 6(a), plaintiffs are entitled to prejudgment interest on the future damages portion of judgments. [[185]](#footnote-186)184 The court asserted that the legislature's use of the word "interest" in section 6(a) fails to differentiate between past and future damages and that,

**[\*263]** therefore, no such distinction may be drawn by the judiciary. [[186]](#footnote-187)185

The court recognized the impurity of meaning resulting from awarding prejudgment interest on both past and future damages, [[187]](#footnote-188)186 but reasoned that the award was nevertheless proper given the legislature's expansive use of the word "interest." [[188]](#footnote-189)187 Employing such an expansive reading seems both illogical and improper, however, and risks overcompensating plaintiffs. [[189]](#footnote-190)188 Such overcompensation results whenever juries calculate awards based on jury charges that ask what sum of money, if paid now in cash, would fairly and reasonably compensate the plaintiff. [[190]](#footnote-191)189 Regardless of the inequitable result inherent in requiring defendants to pay interest for damages not yet suffered by plaintiffs, it is clear that the Texas Supreme Court has now definitively adjudicated this issue. [[191]](#footnote-192)190 Consequently, assuming the supreme court does not revisit its decision, the legislature now bears the burden of re-establish- **[\*264]** ing equity in this area of the law.

The arguments for and against awarding prejudgment interest on future damages are equally valid when considering the appropriateness of awarding such interest on punitive damages. Unlike with future damages, however, the state legislature has formally articulated the preclusion of prejudgment interest on punitive damages. [[192]](#footnote-193)191 The Texas Supreme Court recognized and applied this statutory preclusion as recently as June 1994. [[193]](#footnote-194)192 Seven years prior, however, the same court in Cavnar refused to award prejudgment interest on punitive damages solely on sound legal reasoning. [[194]](#footnote-195)193 The court opined in Cavnar that because punitive damages are intended to punish defendants, rather than compensate plaintiffs, such an interest award is inappropriate. [[195]](#footnote-196)194 Thus, the court concluded that plaintiffs can be made whole without an award of prejudgment interest on punitive damages. [[196]](#footnote-197)195

Disallowing prejudgment interest on future and punitive damages conforms with the underlying principles and objectives of awarding plaintiffs prejudgment interest. To ensure that this widely held belief is applied consistently throughout courts invoking Texas law, it is appropriate that the legislature included an express statutory provision that disallows prejudgment interest on punitive damages. [[197]](#footnote-198)196 Now, the legislature must address the assessment of prejudgment interest on future damages. [[198]](#footnote-199)197

**[\*265]**

VII. The Effect of Texas Usury Law on Prejudgment Interest

Under Texas law, usury is defined as "interest in excess of the amount allowed by law." [[199]](#footnote-200)198 Texas courts have defined the essential elements of a usurious transaction as (1) a loan of money, (2) an absolute obligation that the principal be repaid, and (3) the exaction from the borrower of an amount greater than that allowed by law. [[200]](#footnote-201)199 Given these three essential elements, it is fairly obvious that state usury laws should not apply to prejudgment interest. [[201]](#footnote-202)200 However, past courts have held otherwise. [[202]](#footnote-203)201

In the recent case of Sage Street Associates v. Northdale Construction Co., [[203]](#footnote-204)202 the Texas Supreme Court expressly retreated from the view that state usury laws applied to prejudgment interest. [[204]](#footnote-205)203 The contrary rulings appear to stem from differing interpretations of the Texas Constitution as it applies to usury. [[205]](#footnote-206)204 While past courts broadly applied article XVI,

**[\*266]** section 11 of the Texas Constitution, the Texas Supreme Court in Sage Street adopted a narrow interpretation and refused to apply the constitutional usury provision to prejudgment interest. [[206]](#footnote-207)205 The court distinguished between interest that is judicially imposed and interest that is imposed via a commercial transaction, and highlighted the wholly different nature of prejudgment interest from the type of interest addressed by the state constitution. [[207]](#footnote-208)206 The court concluded that article XVI, section 11 is a restriction on commercial lending and credit contracts. [[208]](#footnote-209)207

Similarly, state usury laws should not apply to pleadings seeking prejudgment interest at rates exceeding those stated by law. [[209]](#footnote-210)208 Holding plaintiffs liable for violating state usury laws based on their prayer for prejudgment interest at rates commonly awarded by the courts would be wholly unjust and terribly ironic. [[210]](#footnote-211)209 Thus, to ensure that plaintiffs are free to request and receive prejudgment interest awards without fear

**[\*267]** of legal reprisal, it is appropriate for the legislature to amend article 5069-1.05 to expressly recognize this right.

VIII. A Proposed Amendment to Article 5069-1.05

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O><O] IS OVERSTRUCK IN THE SOURCE.]

To ensure that all prevailing plaintiffs are fully compensated and to produce equity throughout this area of law, article 5069-1.05 should be amended to read as follows: [[211]](#footnote-212)210

Sec. 1. All judgments of the courts of this state based on a contract that provides for a specific rate of interest earn interest at a rate equal to the lesser of:

(1) the rate specified in the contract; or

(2) 18 percent.

Sec. 2. Except as provided in Section 1 of this article, all judgments, together with taxable court costs, of the courts of this state earn interest, compounded [O>annually<O] daily, at the rate published by the consumer credit commissioner in the Texas Register. The consumer credit commissioner shall compute on the 15th day of each month the judgment interest rate by taking the auction rate quoted on a discount basis for 52-week treasury bills issued by the United States government as published by the Federal Reserve Board on the most recent date preceding the date of computation. The interest rate so computed shall be the judgment rate, [O>except that if the rate so computed is less than 10 percent, the judgment interest rate shall be 10 percent, and if it be more than 20 percent, the judgment interest rate shall be 20 percent.<O] The rate established on that computation date shall be the interest rate on judgments for the next calendar month.

Sec. 3. (a) Except as provided by Subsection (c) of this section, judgments earn interest for the period beginning on the day the judgment is rendered and ending on the day the judgment is satisfied. Interest shall be compounded [O>annually<O] daily.

(b) Each judgment shall state the rate of interest to be earned on that judgment.

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

Sec. 4. This article does not apply to a judgment that earns interest that is set by Title 2, Tax Code. (note omitted)

Sec. 5. The consumer credit commissioner shall cause the judgment rate of interest to be published in the Texas Register at the same time other rates directed to be calculated

**[\*268]** are caused to be published by the consumer credit commissioner under other provisions of this code. The courts of this state shall take judicial notice of such rate as so published.

Sec. 6. (a) [O>Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest. Except as provided by Subsections (b), (c), and (d) of this section, prejudgment interest accrues on the amount of the judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the day the suit is filed, whichever occurs first, and ending on the day preceding the date judgment is rendered.<O] Judgments in all tort actions must include prejudgment interest, unless it is determined by the court that such interest is not required to fully compensate the injured plaintiff. The prejudgment interest accrual period begins on the date of injury, unless the court determines the plaintiff has unreasonably delayed in filing the cause of action, and ends on the day immediately preceding the date judgment is rendered.

(b) The rate of prejudgment interest is based on the floating monthly rate published by the consumer credit commissioner in the Texas Register and is to be compounded on a daily basis. The consumer credit commissioner shall compute on the 15th day of each month the prejudgment interest rate by taking the auction rate quoted on a discount basis for 52week treasury bills issued by the United States government as published by the Federal Reserve Board on the most recent date preceding the date of computation. The rate established on that computation date shall be the prejudgment interest rate for the next calendar month.

[O>(b)<O] (c) If judgment for a claimant is less than the amount of a settlement offer by the defendant, prejudgment interest does not accrue on the amount of the judgment for the period during which the offer may be accepted.

[O>(c)<O] (d) If judgment for a claimant is more than the amount of the settlement offer by the defendant, prejudgment interest does not include prejudgment interest on the amount of the settlement offer for the period during which the offer may be accepted.

[O>(d)<O] (e) In addition to the exceptions provided under Subsections (b) (c) and (c) (d) of this section, the court in its discretion may order that prejudgment interest does or does not accrue during periods of delay in the trial, taking into consideration:

(1) periods of delay caused by a defendant; and

(2) periods of delay caused by a claimant.

[O>(e)<O] (f) In order for a settlement offer to toll the running of prejudgment interest in accordance with the provisions of this section, the offer must be communicated to a party or his attorney or representative in writing.

**[\*269]**

[O>(f)<O] (g) If a settlement offer is made for other than present cash payment at the time of settlement, prejudgment interest on the amount of the settlement offer is computed on the basis of cost or fair market value of the settlement offer at the time it is made.

[O>(g) The rate of prejudgment interest shall be the same as the rate of postjudgment interest at the time of judgment and shall be computed as simple interest.<O]

Sec. 7. The rate of prejudgment interest in condemnation cases shall be the same as the rate of postjudgment interest at the time of judgment and shall be computed as simple interest.

Sec. 8. This article does not apply to interest that accrues on delinquent child support under Section 14.34, Family Code.

Sec. 9. Prejudgment interest may not be awarded on punitive and future damages. Prejudgment interest may, however, be awarded on attorney fees that accrue prior to the date of judgment if the court deems such an award necessary to fully compensate the injured plaintiff.

Sec. 10. Texas state usury laws, including article XVI, section 11 of the State Constitution, do not apply to court imposed prejudgment interest awards, or to pleadings by parties for such awards.

IX. Conclusion

The frequency and magnitude of prejudgment interest awards require a definite methodology for calculating such interest. Clear guidance in this area will facilitate settlement agreements and will ensure increased symmetry and equity throughout Texas tort law. Plaintiffs who suffer pure economic losses, like plaintiffs who suffer personal injuries, are equally entitled to mandatory prejudgment interest to ensure that they are fully compensated for the injuries they have suffered. Interest should accrue from the date of injury and should reflect the standard interest rates and compounding periods that are available to everyday investors.

It is time for the state legislature to amend article 50691.05 to reflect these needs. Such legislation will aid settlement negotiations and will allow judges and practitioners to focus on the substantive issues at bar. Our judiciary is presently overwhelmed with litigation, thus forcing injured plaintiffs to wait years before receiving just compensation. Revised legislation in the area of prejudgment interest will assist in expediting

**[\*270]** settlements and court adjudications and therefore represents one positive step toward easing the burden on plaintiffs, defendants, and the judicial system as a whole.

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1. \*This paper was selected as the recipient of the 1994 Susman, Godfrey, L.L.P. Award for an outstanding paper in the field of general litigation. [↑](#footnote-ref-2)
2. 1 696 S.W.2d 549 (Tex. 1985). [↑](#footnote-ref-3)
3. 2 Id. at 554. [↑](#footnote-ref-4)
4. 3 See Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6 (Vernon Supp. 1994). [↑](#footnote-ref-5)
5. 4 Perry Roofing Co. v. Olcott, 744 S.W.2d 929, 930 (Tex. 1988). [↑](#footnote-ref-6)
6. 5 Refer to subparts V(B)-V(C) infra discussing judicial opinions interpreting and applying Texas statutory prejudgment interest law. [↑](#footnote-ref-7)
7. 6 Dan B. Dobbs, Handbook on the Law of Remedies section 3.5, at 164 (1973). [↑](#footnote-ref-8)
8. 7 Tex. Rev. Civ. Stat. Ann. art. 5069-1.01(a) (Vernon 1987). [↑](#footnote-ref-9)
9. 8 Black's Law Dictionary 812 (6th ed. 1990). [↑](#footnote-ref-10)
10. 9 John C. Keir & Robin C. Keir, Opportunity Cost: A Measure of Prejudgment Interest, 39 Bus. Law. 129, 131 (1983); see Anthony E. Rothschild, Comment, Prejudgment Interest: Survey and Suggestion, 77 Nw. U. L. Rev. 192, 195-96 (1982) (noting that as commercial activity expanded, courts and commentators began viewing interest awards as nothing more than compensation for "the natural growth of money" rather than as a punitive measure). [↑](#footnote-ref-11)
11. 10 Note, Prejudgment Interest in Minnesota, 9 Wm. Mitchell L. Rev. 158, 159 (1983). [↑](#footnote-ref-12)
12. 11 Id. [↑](#footnote-ref-13)
13. 12 Republic Nat'l Bank v. Northwest Nat'l Bank, 578 S.W.2d 109, 116 (Tex. 1978); see Charles T. McCormick, Handbook on the Law of Damages section 50 (1935) (defining prejudgment interest as compensation "allowed by law as additional damages for loss of use of the money due as damages, during the lapse of time since the accrual of the claim"). This form of interest accrues up to the time of judgment and must therefore be distinguished from postjudgment interest, which begins to accrue from the date of judgment. See James D. Wilson et al., Prejudgment Interest in Personal Injury, Wrongful Death and Other Actions, 30 Trial Law. Guide 105, 106 (John J. Kennelly ed. 1986). [↑](#footnote-ref-14)
14. 13 Simple interest involves paying interest only on the principal amount and not on the interest that has accumulated on that principal. See Black's Law Dictionary, supra note 8, at 813. This means that the accumulated interest does not merge with the principal. For example, a 10% prejudgment interest award that accrues over 5 years and is calculated as simple interest on a $ 100,000 judgment award would yield $ 50,000 in total interest. As shown by this example, a simple interest award precludes the payment of interest upon interest.

    Simple interest is distinguished from compound interest because, with compounding, interest is earned on the accumulated interest that has not yet been distributed. Id. Computing the numerical example provided above with annually compounding interest yields total interest of $ 61,051. Refer to note 145 infra for an illustration of the formulas used to calculate these interest amounts. [↑](#footnote-ref-15)
15. 14 See generally Martin Oyos, Comment, Prejudgment Interest in South Dakota, 33 S.D. L. Rev. 484, 485-88 (1988) (providing an interesting overview of the history of prejudgment interest from the ancient Israeli and Greek courts through the English and American courts). [↑](#footnote-ref-16)
16. 15 Note, supra note 10, at 158. [↑](#footnote-ref-17)
17. 16 Don W. Cloud, Jr., Note, Cavnar v. Quality Control Parking, Inc.: Prejudgment Interest Is Now Recoverable in Personal Injury, Wrongful Death and Survival Action Cases, 38 Baylor L. Rev. 385, 389 (1986) (noting that Texas courts have traditionally recognized this distinction). [↑](#footnote-ref-18)
18. 17 Id. at 389-90. [↑](#footnote-ref-19)
19. 18 Id. at 391. One commentator sought to end the formal designation of interest as damages and advocated calling it just what it is--interest. Note, supra note 10, at 187 n.228. [↑](#footnote-ref-20)
20. 19 Hartford Steam Boiler Inspectors & Ins. Co. v. State, 729 S.W.2d 372, 374 (Tex. App.--Austin 1987, writ ref'd n.r.e.). [↑](#footnote-ref-21)
21. 20 Heidenheimer v. Ellis, 3 S.W. 666, 667 (Tex. 1887). [↑](#footnote-ref-22)
22. 21 569 S.W.2d 480, 487 (Tex. 1978) (stating that the roundabout method of allowing interest simply by categorizing it as interest as damages rather than as interest eo nomine was no longer necessary). [↑](#footnote-ref-23)
23. 22 See Keir & Keir, supra note 9, at 135 n.39 (noting that, practically speaking, there is no difference between the two types of interest); Rothschild, supra note 9, at 206 (arguing that categorizing interest as eo nomine or as damages makes a distinction when none exists). Rothschild noted that the actual difference was little more than one of words. Id. (citing The Manhattan, 85 F.2d 427, 429 (3d Cir. 1936), cert. denied, 300 U.S. 654 (1937)). He then concluded that "interest recovery should not hinge on such a narrow thread." Id. [↑](#footnote-ref-24)
24. 23 Note, supra note 10, at 163. [↑](#footnote-ref-25)
25. 24 Id. [↑](#footnote-ref-26)
26. 25 Id. at 189. [↑](#footnote-ref-27)
27. 26 Id. [↑](#footnote-ref-28)
28. 27 Id. [↑](#footnote-ref-29)
29. 28 H. Deane Wong, Prejudgment Interest: Too Little, Too Much, or Both?, 10 UCLA-Alaska L. Rev. 219, 221-22 (1981). [↑](#footnote-ref-30)
30. 29 Wilson et al., supra note 12, at 107. [↑](#footnote-ref-31)
31. 30 Id. at 107-08 (adding that this logic prevented awarding prejudgment interest whenever the precise amount of damages was not readily ascertainable, despite a plaintiff's clear right to compensation). [↑](#footnote-ref-32)
32. 31 Note, supra note 10, at 187. [↑](#footnote-ref-33)
33. 32 See Funkhouser v. J.B. Preston Co., 290 U.S. 163, 168 (1933) (noting that if nothing is awarded to the injured party for the delay in receiving the award, the injured party suffers a loss, regardless of whether the damages are liquidated or unliquidated); Wilson et al., supra note 12, at 108 (commenting on the futility of distinguishing between liquidated and unliquidated damages in the modern world); Wong, supra note 28, at 226 (noting that all damages, whether liquidated or unliquidated, should carry interest from the time the cause of action accrues unless injustice would result) (citing State v. Phillips, 470 P.2d 266, 273-74 (Alaska 1970)); Note, supra note 10, at 191 (arguing that the liquidated-unliquidated distinction should make no difference in prejudgment interest awards because prejudgment interest is a remedial damage rather than a substantive element of an agreement). [↑](#footnote-ref-34)
34. 33 See, e.g., Crown Cent. Petroleum Corp. v. National Union Fire Ins. Co., 768 F.2d 632, 636 (5th Cir. 1985) (concluding that determining whether a plaintiff is entitled to prejudgment interest no longer depends on whether the sum due is ascertainable with reasonable certainty); Quintero v. Jim Walter Homes, Inc., 709 S.W.2d 225, 231 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.) (interpreting the Texas Supreme Court's broad language in Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), as allowing prejudgment interest awards "whenever a plaintiff has suffered a harm, liquidated or not"). One commentator summarized this shift in the law by stating that Texas courts have "eroded the . . . distinction between claims in which the damages are or are not fixed and ascertainable and have allowed plaintiffs prejudgment interest recoveries on liquidated and unliquidated claims in both contract and tort disputes." Barbara A. Clark, Prejudgment Interest After Cavnar: What Rate Applies?, 50 Tex. B.J. 126, 126 (1987). [↑](#footnote-ref-35)
35. 34 Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541, 548 (5th Cir. 1987). [↑](#footnote-ref-36)
36. 35 Wong, supra note 28, at 241. [↑](#footnote-ref-37)
37. 36 Refer to Part V infra. [↑](#footnote-ref-38)
38. 37 See Hansen v. Continental Ins. Co., 940 F.2d 971, 984 (5th Cir. 1991) (pointing out the apparent disparity in Texas prejudgment interest law). [↑](#footnote-ref-39)
39. 38 40 S.W. 11 (Tex. 1897), overruled by Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985). [↑](#footnote-ref-40)
40. 39 Id. at 12. [↑](#footnote-ref-41)
41. 40 Cloud, supra note 16, at 385 n.2; Stephen W. Kotara, Note, Prejudgment Interest Available on Accrued Damages in Personal Injury, Wrongful Death, and Survival Actions: Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985), 17 Tex. Tech. L. Rev. 293, 297 (1986) (dubbing the outright denial of prejudgment interest awards on unliquidated damages in both contract and tort cases "the Watkins rule"). [↑](#footnote-ref-42)
42. 41 696 S.W.2d 549, 554 (Tex. 1985) (allowing recovery of prejudgment interest and expressly overruling past conflicting decisions). [↑](#footnote-ref-43)
43. 42 The goals stated by the court were full and speedy compensation of the injured plaintiff, restoration of "equity and symmetry to this area of the law, and inducement to the defense to promptly consider settlement possibilities." Id. [↑](#footnote-ref-44)
44. 43 See e.g., Benavidez v. Isles Constr. Co., 726 S.W.2d 23, 26 (Tex. 1987) (stating that recovering prejudgment interest simply requires a mechanistic application of Cavnar); Champion v. Wright, 740 S.W.2d 848, 857 (Tex. App.--San Antonio 1987, writ denied) (remanding so that prejudgment interest could be computed according to guidelines set forth in Cavnar); Acco Constructors, Inc. v. National Steel Prods. Co., 733 S.W.2d 368, 371 (Tex. App.--Houston [14th Dist.] 1987, no writ) (concluding that Cavnar establishes a uniform standard for determining prejudgment interest when the amount of interest is not controlled by operation of law). [↑](#footnote-ref-45)
45. 44 See, e.g., Crown Cent. Petroleum Corp. v. National Union Fire Ins. Co., 768 F.2d 632, 636 (5th Cir. 1985) (concluding that although the holding in Cavnar is "ostensibly limited to wrongful death, survival, and personal injury actions," it logically should be interpreted to create a new prejudgment interest rule in all cases); Voskamp v. Arnoldy, 749 S.W.2d 113, 124 (Tex. App.--Houston [1st Dist.] 1987, writ denied) (applying the Cavnar rule to a fraud action); City of Houston v. Wolfe, 712 S.W.2d 228, 230 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd) (stating that the Cavnar rationale applies to all types of cases, including eminent domain cases). [↑](#footnote-ref-46)
46. 45 744 S.W.2d 929 (Tex. 1988). [↑](#footnote-ref-47)
47. 46The court of appeals correctly decided to extend this court's holding in Cavnar and apply its rationale to a breach of contract action for unascertainable damages." Perry Roofing, 744 S.W.2d at 931. However, in a dissenting opinion, Justice Wallace argued that the court took unwarranted liberty in extending the Cavnar holding to such an extent. Id. at 932 (Wallace, J. dissenting). [↑](#footnote-ref-48)
48. 47 See Allen v. Allen, 751 S.W.2d 567, 576 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (stating that the Texas Supreme Court's decision in Perry Roofing apparently eliminates some of the uncertainty concerning Cavnar's applicability). [↑](#footnote-ref-49)
49. 48 See, e.g., Law Offices of Moore & Assocs. v. Aetna Ins. Co., 902 F.2d 418, 422 (5th Cir. 1990) (noting that Perry Roofing and other cases have recognized the availability of prejudgment interest in the commercial context); Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541, 549-50 (5th Cir. 1987) (noting that the Cavnar rule has been applied in both DTPA and lost profit cases and advocating its applicability to a case involving a contractual dispute and a DTPA claim). But see Guest v. Phillips Petroleum Co., 981 F.2d 218, 223 (5th Cir. 1993) (indicating dissatisfaction with the Cavnar rule). [↑](#footnote-ref-50)
50. 49 See Stephen W. Smith, Prejudgment Interest on Contracts: The Forgotten Constitutional Dimension, Hous. Law., May-June 1989, at 20, 22 (discussing Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6). [↑](#footnote-ref-51)
51. 50 Id. (deeming the amendment to article 5069-1.05 "a modified version of the Cavnar prejudgment interest rule"); see also Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc., 739 F. Supp. 338, 340 (S.D. Tex. 1990) (stating that "section 6 [of art. 5069-1.05] both modifies and codifies Cavnar"), aff'd, 956 F.2d 265 (5th Cir. 1992). [↑](#footnote-ref-52)
52. 51 Section 6 reads in part: "Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest." Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6(a). [↑](#footnote-ref-53)
53. 52 See Smith, supra note 49, at 22 (commenting that the amended version of article 5069-1.05 raises many questions, including some regarding its intended scope). Further, it remains unclear whether the statute is intended to apply to all cases or just the three listed in section 6(a). Id. Plausible arguments can be made for and against a limited reading of the statute. Id. Refer to subpart V(C) infra for a more detailed discussion on the scope of article 5069-1.05. [↑](#footnote-ref-54)
54. 53 Note, supra note 10, at 164. [↑](#footnote-ref-55)
55. 54 Oyos, supra note 14, at 484. [↑](#footnote-ref-56)
56. 55 Cloud, supra note 16, at 399. Some believe that a fourth justification for awarding prejudgment interest is to punish defendants. See Note, supra note 10, at 164 (briefly discussing a punitive theory of prejudgment interest). But see Thomas F. Londrigan & Lawrence R. Smith, Prejudgment Interest: Is There Profit in Court Delay?, Judges J., Fall 1984, at 12, 48 (arguing that "prejudgment interest should not be awarded to punish a defendant because prejudgment interest is a concept of fairness and equity"). [↑](#footnote-ref-57)
57. 56 Londrigan & Smith, supra note 55, at 48 (stating that the fairness and justice aspects associated with awarding prejudgment interest apply to property and contract cases in the same manner as they apply to personal injury and death cases). [↑](#footnote-ref-58)
58. 57 See Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 552 (Tex. 1985) (emphasizing that the primary objective of damage awards in civil suits is compensation of injured plaintiffs); Rothschild, supra note 9, at 192 (declaring plaintiff compensation to be the primary purpose of damage awards in civil actions); Wilson et al., supra note 12, at 105 (suggesting that the primary purpose of modern tort law is to compensate those who have suffered injuries due to the wrongful acts of others). [↑](#footnote-ref-59)
59. 58 Keir & Keir, supra note 9, at 133; Note, supra note 10, at 164. [↑](#footnote-ref-60)
60. 59 Wong, supra note 28, at 222 (stating that the inherent income-producing ability of money is inseparable from the money itself). [↑](#footnote-ref-61)
61. 60 Cavnar, 696 S.W.2d at 552. Absent the occurrence giving rise to the claim, the plaintiffs could have invested the money and earned interest between the time of the occurrence and the date of the judgment. Id. See generally Keir & Keir, supra note 9, for a thorough analysis of the opportunity cost aspect of prejudgment interest. [↑](#footnote-ref-62)
62. 61 In re Pago Pago Aircrash of Jan. 30, 1974, 525 F. Supp. 1007, 1014 (C.D. Cal. 1981). [↑](#footnote-ref-63)
63. 62 Rothschild, supra note 9, at 192. [↑](#footnote-ref-64)
64. 63 This theory, often referred to as the restitution theory, is the plaintiff compensation theory's counterpart. Note, supra note 10, at 165-66. [↑](#footnote-ref-65)
65. 64 Rothschild, supra note 9, at 205 (equating the value of the plaintiff's use of the funds with the amount the defendant is unjustly enriched). [↑](#footnote-ref-66)
66. 65 Wilson et al., supra note 12, at 110. [↑](#footnote-ref-67)
67. 66 Keir & Keir, supra note 9, at 136. [↑](#footnote-ref-68)
68. 67 Id. at 136-37 (arguing that the illusory benefits to a defendant who fails to properly invest will not provide the requisite dollars to cover a prejudgment interest award). This arguably creates a punitive rather than compensatory effect. [↑](#footnote-ref-69)
69. 68 See, for example, Phillips Petroleum Co. v. Adams, 513 F.2d 355, 370 (5th Cir.), cert. denied, 423 U.S. 930 (1975), which stated:

    Texas courts . . . realize that the right to interest is a marketplace concept and that the use of money is a mercantile privilege which should not go uncompensated, absent countervailing considerations. . . . Defendant cannot be heard to say that it is fair and equitable that it should enjoy such a financial advantage for so long, and pay not a cent for it. [↑](#footnote-ref-70)
70. 69 C & H Nationwide, Inc. v. Thompson, No. D-1326, 1994 WL 278167, at \*12 (Tex. June 22, 1994); Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985) (announcing that awarding prejudgment interest at a rate close to the market rate will serve to expedite both settlements and trials by removing existing incentives for delays by defendants without creating dilatory incentives for plaintiffs). [↑](#footnote-ref-71)
71. 70 Wilson et al., supra note 12, at 110. [↑](#footnote-ref-72)
72. 71 Kotara, supra note 40, at 312. [↑](#footnote-ref-73)
73. 72 Londrigan & Smith, supra note 55, at 17. [↑](#footnote-ref-74)
74. 73 Id. at 16, 45. Londrigan and Smith argue that no amount of effort by judges and practitioners will solve the court backlog absent a multiple increase in judges and court administrators. [↑](#footnote-ref-75)
75. 74 See id. at 48-49. The first of these five objections is the strongest and is supported by an exhaustive study conducted by the Rand Corporation, which concluded that juries increase the damage award in direct correlation to the length of delay prior to receiving that award. Id. at 44 (citing a 1983 Rand Report (N-1994IC, May, 1983) that studied jurors in Cook County, Illinois over nearly a 20 year period and concluded that jurors increased awards an average of 3.7% per year above the inflation rate for each year of delay). Id. at 46 n.13. [↑](#footnote-ref-76)
76. 75 Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 552 (Tex. 1985); A.V.I., Inc. v. Heathington, 842 S.W.2d 712, 717 (Tex. App.--Amarillo 1992, writ denied). [↑](#footnote-ref-77)
77. 76 E.g., Tex. Rev. Civ. Stat. Ann. art. 5069-1.03 (Vernon 1987); Tex. Rev. Civ. Stat. Ann. art. 5069-1.05 (Vernon Supp. 1994). [↑](#footnote-ref-78)
78. 77 Article 5069-1.03 reads:

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

    Tex. Rev. Civ. Stat. Ann. art. 5069-1.03. [↑](#footnote-ref-79)
79. 78 See, e.g., Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1499 (5th Cir. 1992) (finding that the contracts under dispute did not unambiguously establish the amount owed and therefore prejudgment interest under article 5069-1.03 could not be awarded); Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 402 (5th Cir. 1989) (concluding that statutory prejudgment interest under article 5069-1.03 was not available because the defendant reasonably challenged the amount owed and the liability). Refer to subpart V(B) infra for a more detailed discussion of the application of article 5069-1.03 by Texas courts. [↑](#footnote-ref-80)
80. 79 Tex. Rev. Civ. Stat. Ann. art. 5069-1.05. [↑](#footnote-ref-81)
81. 80 696 S.W.2d 549 (Tex. 1985); see Smith, supra note 49, at 22 (noting that the amended statute was a "modified version" of the prejudgment interest rule in Cavnar and discussing the differences between Cavnar and the new statute). [↑](#footnote-ref-82)
82. 81 See art. 5069-1.05, section 6 (stating that "judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest"). [↑](#footnote-ref-83)
83. 82 See Miller v. Kendall, 804 S.W.2d 933, 944 (Tex. App.--Houston [1st Dist.] 1990, no writ) (stating that "the scope of [section] 6 is an open question"). [↑](#footnote-ref-84)
84. 83 This Comment fully discusses the breadth of article 5069-1.05 and its application to cases other than wrongful death, personal injury, and property damage. Refer to subpart V(C) infra. [↑](#footnote-ref-85)
85. 84 3 S.W. 666 (Tex. 1887). [↑](#footnote-ref-86)
86. 85 Id. at 667 (stating that interest "may be assessed as damages, when necessary to indemnify a party for an injury inflicted by his adversary, though the statute be silent upon the subject"). [↑](#footnote-ref-87)
87. 86 See Concorde Limousines v. Moloney Coachbuilders, Inc., 835 F.2d 541, 548 (5th Cir. 1987) (stating that Texas case law throughout the nineteenth century resulted in a large "jumble of rules and exceptions" developed in the name of equity). [↑](#footnote-ref-88)
88. 87 See Crown Cent. Petroleum Corp. v. National Union Fire Ins. Co., 768 F.2d 632, 637 (5th Cir. 1985) (recognizing that prior to Cavnar the availability of statutory prejudgment interest in no way precluded the awarding of equitable prejudgment interest). The court added that the Texas Supreme Court's drastic alteration of the manner in which equitable prejudgment interest is awarded should not effect the availability of equitable prejudgment interest even when statutory prejudgment interest is available. Id. In ***Kern*** ***Oil*** & Ref. Co. v. Tenneco ***Oil*** Co., the Ninth Circuit relied on Crown Central and awarded equitable prejudgment interest even though statutory prejudgment interest was available under article 5069-1.03. 840 F.2d 730, 739 (9th Cir.), cert. denied, 488 U.S. 948 (1988). [↑](#footnote-ref-89)
89. 88 Prior to Cavnar, the courts had determined that an equitable award of prejudgment interest in excess of the statutory rate was within a court's discretion. Crown Cent., 768 F.2d at 637; Dallas-Fort Worth Regional Airport Bd. v. Combustion Equip. Assocs., Inc., 623 F.2d 1032, 1041 (5th Cir. 1980). However, following Cavnar, federal and state courts alike generally held that equitable discretion to award an amount different from the statutory rate had been removed. See, e.g., Wood v. Armco, Inc., 814 F.2d 211, 214 (5th Cir. 1987) (analyzing the applicability of article 5069-1.03 and concluding that when a case falls within the express terms of a statute, any prejudgment interest awarded on an equitable basis should follow the express rate specified in the statute); Crown Cent., 768 F.2d at 637-38 (holding that the trial court does not have discretion to award a rate other than the statutory rate); Baker Marine Corp. v. Weatherby Eng'g Co., 710 S.W.2d 690, 695 (Tex. App.--Corpus Christi 1986, no writ) (holding that when a statute is applicable the court does not have any discretion to award a rate higher than that set by the statute). But see, e.g., ***Kern*** ***Oil***, 840 F.2d at 739-40 (awarding prejudgment interest at the rate of 10% despite the 6% rate mandated by article 5069-1.03). Awarding the higher interest rate may have been the result of the court's simple misapplication of Cavnar. [↑](#footnote-ref-90)
90. 89 Cavnar v. Quality Control Packing, Inc., 696 S.W.2d 549, 553-54 (Tex. 1985). [↑](#footnote-ref-91)
91. 90 See, e.g., Axelson, Inc. v. McEvoy-Willis Ltd., 7 F.3d 1230, 1234 (5th Cir. 1993) (claiming that Texas law allows prejudgment interest awards in contract cases " 'in all but the most exceptional circumstances' " (quoting Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 402 (5th Cir. 1989))); Thomasson, 863 F.2d at 402 (interpreting Texas law after Cavnar as allowing the recovery of prejudgment interest in both contract and tort actions as a matter of equity); Rio Grande Land & Cattle Co. v. Light, 758 S.W.2d 747, 748 (Tex. 1988) (stating that the appropriate basis for prejudgment interest in the contract case before the court is equity because article 5069-1.03 was inapplicable); H.E. Butt Grocery Co. v. Bay, Inc., 808 S.W.2d 678, 680-81 (Tex. App.--Corpus Christi 1991, writ denied) (awarding prejudgment interest on equitable grounds because neither article 5069-1.03 nor article 5069-1.05 was applicable). [↑](#footnote-ref-92)
92. 91 Concorde Limousines v. Moloney Coachbuilders, Inc., 835 F.2d 541, 548 (5th Cir. 1987). Refer to subpart V(B) infra for further discussion and analysis of the current maze of legal decisions in this area of prejudgment interest. [↑](#footnote-ref-93)
93. 92 Tex. Rev. Civ. Stat. Ann. art. 5069-1.03. [↑](#footnote-ref-94)
94. 93 249 S.W. 193, 194-95 (1923). [↑](#footnote-ref-95)
95. 94 Id. at 195. [↑](#footnote-ref-96)
96. 95 Id. [↑](#footnote-ref-97)
97. 96 Lubrizol Corp. v. Cardinal Constr. Co., 868 F.2d 767, 772 (5th Cir. 1989) (noting the liberal construction of article 5069-1.03 originally adopted in Kriton); see also Atchison, Topeka & Santa Fe Ry. v. Sherwin-Williams Co., 963 F.2d 746, 751 (5th Cir. 1992) (holding that article 5069-1.03 governs whenever "the contract adequately shows the measure of liability" (emphasis added)). The court also included a somewhat metaphysical description of when article 5069-1.03 applies, adding that a court must "look to the surface of the contract and see a visible perimeter encircling the prescribed contractual liability." Id. at 752. Missouri-Kansas-Texas R.R. v. Fiberglass Insulators, 707 S.W.2d 943 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.), states an even broader definition of art. 5069-1.03's applicability. It interprets the statute as being applicable in any contractual dispute involving parties to a contract who have not previously agreed upon an interest rate. Id. at 948. [↑](#footnote-ref-98)
98. 97 See, e.g., Rio Grande Land & Cattle Co. v. Light, 758 S.W.2d 747, 748 (Tex. 1988); Perry Roofing Co. v. Olcott, 744 S.W.2d 929, 930 (Tex. 1988); Allied Chem. Co. v. DeHaven, 824 S.W.2d 257, 266-67 (Tex. App.--Houston [14th Dist.] 1992, no writ); OKC Corp. v. UPG, Inc., 798 S.W.2d 300, 307-08 (Tex. App.--Dallas 1990, writ denied); Phillips v. Phillips, 792 S.W.2d 269, 273 (Tex. App.--Tyler 1990), aff'd, 820 S.W.2d 785 (Tex. 1991); Winograd v. Willis, 789 S.W.2d 307, 312 (Tex. App.--Houston [14th Dist.] 1990, writ denied); University Sav. Ass'n v. Burnap, 786 S.W.2d 423, 427 (Tex. App.--Houston [14th Dist.] 1990, no writ). [↑](#footnote-ref-99)
99. 98 See, e.g., Perry Roofing, 744 S.W.2d at 930 (stating that even a liberal interpretation of article 5069-1.03 requires the sum payable to be ascertainable with reasonable certainty); OKC Corp., 798 S.W.2d at 307-08 (noting that article 5069-1.03 does not apply when the contract does not provide guidance in ascertaining the measure of damages suffered); Liquid Energy Corp. v. Trans-Pan Gathering, Inc., 758 S.W.2d 627, 638 (Tex. App.--Amarillo 1988) (indicating that article 5069-1.03 is applicable only when the breached contract allows the measure of damages to be determined with reasonable certainty), vacated, 762 S.W.2d 759 (Tex. App.--Amarillo 1988, no writ). [↑](#footnote-ref-100)
100. 99 See Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 402 (5th Cir. 1989) (applying article 5069-1.03 only when "the contract or account unambiguously established the amount owed"). Later courts have followed this same standard thereby giving article 5069-1.03 a very narrow reading. See, e.g., Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1499 (5th Cir. 1992) (confirming that article 5069-1.03 applies only when the contract unambiguously establishes the amount owed); Law Offices of Moore & Assocs. v. Aetna Ins. Co., 902 F.2d 418, 421 (5th Cir. 1990) (applying the "unambiguous" standard of Campbell); Phillips, 792 S.W.2d at 273 (requiring a precise basis for determining damages in order to apply article 5069-1.03); Winograd, 789 S.W.2d at 312 (reaffirming that article 5069-1.03 applies only when a fixed sum of damages is ascertainable from the face of the contract). But see Lake LBJ Mun. Util. Dist. v. Coulson, 839 S.W.2d 880, 887 (Tex. App.--Austin 1992, no writ) (requiring only that the measure of recovery and not the amount of recovery be determined by the contract). [↑](#footnote-ref-101)
101. 100 The less definite standard announced in Kriton--the ascertainable sum required by statute is satisfied when the conditions upon which liability turns are stated in the contract--provides far less certainty than the standard proposed by Campbell, Moore, and Enserch, which calls for absolute certainty as to the amount of damages. [↑](#footnote-ref-102)
102. 101 Smith, supra note 49, at 22. [↑](#footnote-ref-103)
103. 102 Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6(g) (stating that "the rate of prejudgment interest shall be . . . computed as simple interest"). [↑](#footnote-ref-104)
104. 103 Smith, supra note 49, at 22; see Miller v. Kendall, 804 S.W.2d 933, 944 (Tex. App.--Houston [1st Dist.] 1990, no writ) (admitting that "the scope of [section] 6 is an open question"). [↑](#footnote-ref-105)
105. 104 See, e.g., Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc., 739 F. Supp. 338, 340-41 (S.D. Tex. 1990) (inferring from the express inclusion in section 6 of only wrongful death, personal injury, and property damage actions, that the statute does not apply to commercial disputes). The court in Crocker National Bank added that the statute might apply to other types of cases if article 5069-1.05 contained a section "6 1/2," legislating a general right to prejudgment interest, but that the amendment in its current form undercut any authority Cavnar had given to prejudgment interest awards in general. Id.; see also Associated Tel. Directory Publishers, Inc. v. Five D's Publishing Co., 849 S.W.2d 894, 900 (Tex. App.--Austin 1993, no writ) (holding that conversion and unfair competition fall outside the plain meaning of article 5069-1.05, thus making that statute inapplicable). The court added that if the legislature had intended section 6 to apply to all torts, it could have expressed that intent in the statute. Crocker Nat'l Bank, 739 F. Supp. at 340-41; see also Ralston Purina Co. v. McKendrick, 850 S.W.2d 629, 637 (Tex. App.--San Antonio 1993, writ denied) (concluding that unless a case is for wrongful death, personal injury, or property damage, it falls outside the scope of article 5069-1.05); H.E. Butt Grocery Co. v. Bay, Inc., 808 S.W.2d 678, 680 (Tex. App.--Corpus Christ 1991, writ denied) (holding that because this case "is not one for wrongful death, personal injury, or property damage, article 5069-1.05 section 6(a) clearly does not apply"). [↑](#footnote-ref-106)
106. 105 See, e.g., Federal Sav. & Loan Ins. Corp. v. Texas Real Estate Counselors, Inc., 955 F.2d 261, 270 (5th Cir. 1992) (applying article 5069-1.05 to a case involving a negligent real estate appraisal action); Law Offices of Moore & Assoc. v. Aetna Ins. Co., 902 F.2d 418, 422 (5th Cir. 1990) (applying article 5069-1.05 to an action to recover attorney fees); Perry Roofing v. Olcott, 744 S.W.2d 929, 931 (Tex. 1988) (applying article 5069-1.05 to a breach of warranty case for improper roof installation); Sadler v. Duvall, 815 S.W.2d 285, 294 (Tex. App.--Texarkana 1991, writ denied) (applying article 5069-1.05 to a case for conversion of timber). [↑](#footnote-ref-107)
107. 106 See, e.g., Axelson, Inc. v. McEvoy-Willis, Ltd., 7 F.3d 1230, 1234 (5th Cir. 1993) (concluding that article 5069-1.05 applies whenever a contract does not unambiguously establish the amount owed); Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1499 (5th Cir. 1992) (stating that courts should award prejudgment interest according to article 5069-1.05 when article 5069-1.03 is inapplicable); Lake LBJ Mun. Util. Dist. v. Coulson, 839 S.W.2d 880, 888 (Tex. App.--Austin 1992, no writ) (interpreting the Texas Supreme Court's decision in Perry Roofing to require application of article 5069-1.05 in all contract cases in which article 5069-1.03 does not apply); Rauscher Pierce Refsnes, Inc. v. Koenig, 794 S.W.2d 514, 517 (Tex. App.--Corpus Christi 1990, writ denied) (holding that article 5069-1.05 applies in breach of contract cases in which the damage amount is not ascertainable from the face of the contract). [↑](#footnote-ref-108)
108. 107 See, e.g., Axelson, 7 F.3d at 1234 (stating that the rate under article 50691.05 applies when the interest award is based in equity); Enserch, 952 F.2d at 1499 (stating that "article 5069-1.05 applies prejudgment interest according to equitable principles"); Voskamp v. Arnoldy, 749 S.W.2d 113, 124 (Tex. App.--Houston [1st Dist.] 1987, writ denied) (referring to the equitable goal of both Cavnar and article 5069-1.05 to fully compensate injured plaintiffs). [↑](#footnote-ref-109)
109. 108 Section 2 states that "all judgments . . . of the courts of this state earn interest." Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 2. Courts and commentators have interpreted this section to cover both prejudgment and postjudgment interest. See Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541, 549 (5th Cir. 1987) (interpreting Cavnar as mandating the application of article 50691.05, section 2 to prejudgment interest unless exceptional circumstances exist); First State Bank v. Wallace, 788 S.W.2d 41, 43 (Tex. App.--Houston [1st Dist.] 1990, no writ) (allowing postjudgment interest to accrue during an appeal and to be awarded if the plaintiff prevails); Employers Mut. Casualty Co. v. Tascosa Nat'l Bank, 767 S.W.2d 279, 284 (Tex. App.--Amarillo 1989, writ denied) (awarding postjudgment interest as prescribed by article 5069-1.05, section 2); Acco Constructors v. National Steel Prods. Co., 733 S.W.2d 368, 371 (Tex. App.--Houston [14th Dist.] 1987, no writ) (stating that the trial court erred in awarding prejudgment interest at a rate less than that mandated in article 5069-1.05, section 2); Smith, supra note 49, at 21 (noting Cavnar's application of section 2 to prejudgment interest).

     While this interpretation of section 2 seems to reflect the current state of the law, arguably section 2 was intended to apply only to postjudgment interest. The language of that section requires interest to accrue on all judgments arising from contract disputes. Prejudgment interest accrues prior to judgment. A strict reading of section 2 would seem, therefore, to conclude that it is inapplicable to prejudgment interest. [↑](#footnote-ref-110)
110. 109 739 F. Supp. 338 (S.D. Tex. 1990). [↑](#footnote-ref-111)
111. 110 Id. at 341. The court stated: "Whatever authority for the court to award prejudgment interest that can be implied from Cavnar was undercut by the legislature when it enacted [section] 6 . . . ." Id. [↑](#footnote-ref-112)
112. 111 Id. (concluding that because section 6 addressed wrongful death, personal injury, and property damage actions, and was silent as to commercial disputes, "there is no statutory authority for the award of prejudgment interest in [commercial cases]"). This statement, combined with the court's prior statement concerning the "undercutting" effect of article 5069-1.05 on the Cavnar decision, effectively denounces both the statutory and common-law bases for awarding prejudgment interest in economic loss actions not involving ascertainable damages. See id. [↑](#footnote-ref-113)
113. 112 This was precisely the approach followed by the court in Crocker National Bank. The court held that despite the lack of an applicable statute or binding case law, it retained the ability to award prejudgment interest through its equitable powers. Id. [↑](#footnote-ref-114)
114. 113 See, e.g., Spangler v. Jones, 861 S.W.2d 392, 398 (Tex. App.--Dallas 1993, writ denied) (relying on the equitable principles outlined in Cavnar and Perry Roofing to award prejudgment interest in a breach of fiduciary duty and fraud action); Associated Tel. Directory Publishers, Inc. v. Five D's Publishing Co., 849 S.W.2d 894, 900 (Tex. App.--Austin 1993, n.w.h.) (holding that the trial court's reliance on Cavnar supported the prejudgment interest award in an unfair competition and conversion case); A.V.I., Inc. v. Heathington, 842 S.W.2d 712, 718 (Tex. App.--Amarillo 1992, writ denied) (relying on the spirit and express language of Cavnar to award prejudgment interest in a deceptive trade practices action). [↑](#footnote-ref-115)
115. 114 See Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6. [↑](#footnote-ref-116)
116. 115 For instance, an award of $ 10,000 compounded at a rate of 10% will double in 7 years. That same award will double in 4.65 years at a 15% rate. Londrigan & Smith, supra note 55, at 14. This conclusion is reached through the use of the following formula:

     S = P (1 + r)n

     Where:

     S = Total award (principal and interest)

     P = Principal amount

     r = Interest rate

     n = Number of compounding periods

     See Patrick J. McDivitt, Pre-Judgment Interest an Element of Damages: Proposed Solutions for a Colorado Problem, 49 U. Colo. L. Rev. 335, 336 n.7 (1978) (using the same formula to calculate compound interest). [↑](#footnote-ref-117)
117. 116 See Wilson et al., supra note 12, at 117-18 (describing fixed and floating interest rates). The authors actually divide the floating rate method into rates set by the court or jury, based upon equitable principles and rates established by an index. Id. at 118. It is also worth noting that, in contrast to floating and fixed interest rates, an interest rate that is agreed upon by the parties to a contract is referred to as "conventional interest" in the Texas statute. Tex. Rev. Civ. Stat. Ann. art. 5069-1.01(c) (Vernon 1987). [↑](#footnote-ref-118)
118. 117 See Wilson et al., supra note 12, at 118. [↑](#footnote-ref-119)
119. 118 Fixed or "legal" interest is defined as "that interest which is allowed by law when the parties to a contract have not agreed on any particular rate of interest." Tex. Rev. Civ. Stat. Ann. art. 5069-1.01(b) (Vernon 1987). [↑](#footnote-ref-120)
120. 119 Wilson et al., supra note 12, at 117-18. [↑](#footnote-ref-121)
121. 120 Id. at 118; see also Keir & Keir, supra note 9, at 150 (claiming that a static approach is simply inadequate to deal with the dynamic nature of interest fluctuations); McDivitt, supra note 115, at 355 (concluding that "an inflexible statute cannot provide appropriate interest compensation" when market rates are constantly changing). [↑](#footnote-ref-122)
122. 121 See Rothschild, supra note 9, at 220 (explaining that locking plaintiffs into a statutory rate guarantees only that some will be overcompensated and others will be undercompensated, depending on existing market rates); Wilson et al., supra note 12, at 117-18 (describing how statutory rates that are below market rates undercompensate plaintiffs and how those above market rates punish defendants by forcing them to pay too much for the use of the plaintiff's money). [↑](#footnote-ref-123)
123. 122 Legal rates that exceed market rates encourage plaintiffs to refrain from entering serious settlement negotiations because the higher prejudgment interest rate would probably result in higher earnings than could be realized by the plaintiff investing in the market. Wilson et al., supra note 12, at 117. Likewise, when legal rates are below market rates, an incentive is created for defendants to delay because they are able to earn excess revenue by investing expected damage judgments. Id.

     Article 5069-1.03 mandates a 6% fixed legal rate of interest. Tex. Rev. Civ. Stat. Ann. art. 5069-1.03. This rate is awarded only when the parties have not agreed upon a different rate of interest in the contract and when damages stemming from a breach of contract are readily ascertainable. See Keir & Keir, supra note 9, at 132 (stating that courts award interest at the legal rate when there is no specified rate agreed upon by the parties to a contract). Refer to subpart V(B) supra for a discussion of the application of article 5069-1.03. [↑](#footnote-ref-124)
124. 123 See Keir & Keir, supra note 9, at 133 (arguing that adequate compensation will not be awarded if a prevailing plaintiff only receives prejudgment interest that is less than he would have earned had he personally invested the judgment proceeds during the pretrial period). The authors suggest that courts should award interest rates in excess of the legal rate whenever it is necessary to ensure full compensation of the plaintiff. Id.; Rothschild, supra note 9, at 220 (asserting that the achievement of full compensation should be the only significant consideration for the court in determining the prejudgment interest rate). [↑](#footnote-ref-125)
125. 124 Keir & Keir, supra note 9, at 139; see Oyos, supra note 14, at 510 (concluding that the prejudgment interest rate should closely reflect rates generally available to investors). Oyos further concludes that legal rates that correlate with market rates place defendants in the same position as if the damages had been paid when the injury occurred. Id. [↑](#footnote-ref-126)
126. 125 Wilson et al., supra note 12, at 119. [↑](#footnote-ref-127)
127. 126 Wong, supra note 28, at 238. [↑](#footnote-ref-128)
128. 127 E.g., commentators have suggested that whichever floating index is used, the lower limit should be the rate of return on low-risk investments and the upper limit should be the greater of the average return on mutual funds and the individual's historical average rate of return. Keir & Keir, supra note 9, at 149. [↑](#footnote-ref-129)
129. 128 See Lubrizol Corp. v. Cardinal Constr. Co., 868 F.2d 767, 771 (5th Cir. 1989) (commenting on Texas's checkered history on prejudgment interest rates); Cloud, supra note 16, at 393 (maintaining that prior to Cavnar, uncertainty existed as to the proper prejudgment interest rate). [↑](#footnote-ref-130)
130. 129 Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985). [↑](#footnote-ref-131)
131. 130 Id. at 554 n.3 (citing Tex. Rev. Civ. Stat. Ann. art 5069-1.05, section 2). [↑](#footnote-ref-132)
132. 131 E.g., Perry Roofing Co. v. Olcott, 744 S.W.2d 929, 930 (Tex. 1988); Acco Constructors, Inc. v. National Steel Prods. Co., 733 S.W.2d 368, 371 (Tex. App.--Houston [14th Dist.] 1987, no writ); Allied Bank v. C.B.D. & Assoc., Inc., 728 S.W.2d 49, 59 (Tex. App.--Houston [1st Dist.] 1987, writ ref'd n.r.e); Ralston Purina Co. v. Barkley Feed & Seed Co., 722 S.W.2d 431, 436 (Tex. App.--Houston [1st Dist.] 1986), rev'd, 744 S.W.2d 932 (Tex. 1988); City of Houston v. Wolfe, 712 S.W.2d 228, 229 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd); Quintero v. Jim Walter Homes, Inc. 709 S.W.2d 225, 231 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.); McKinney v. Meador, 695 S.W.2d 812, 814-15 (Tex. App.--Tyler 1985, writ ref'd n.r.e.). The Acco court added that once a court determines that prejudgment interest should be awarded, it has no discretion as to the amount. Acco, 733 S.W.2d at 371. [↑](#footnote-ref-133)
133. 132 Note the routine use of the 10% interest rate by the courts over the past 8 years. E.g., Federal Sav. & Loan Ins. Corp. v. Texas Real Estate Counselors, 955 F.2d 261, 270 (5th Cir. 1992); Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1504 (5th Cir. 1992); Hansen v. Continental Ins. Co., 940 F.2d 971, 984-85 (5th Cir. 1991); Law Offices of Moore & Assocs. v. Aetna Ins. Co., 902 F.2d 418, 422 (5th Cir. 1990); Farmland Indus., Inc. v. Andrews Transp. Co., 888 F.2d 1066, 1068 (5th Cir. 1989); ***Kern*** ***Oil*** & Ref. Co. v. Tenneco ***Oil*** Co., 840 F.2d 730, 739-40 (9th Cir.), cert. denied, 488 U.S. 948 (1988); Concorde Limousines, Inc. v. Moloney Coachbuilders Inc., 835 F.2d 541, 550 (5th Cir. 1987); Sage St. Assocs. v. Northdale Constr. Co., 863 S.W.2d 438, 439 (Tex. 1993); CKB & Assocs., Inc. v. Moore McCormack Petroleum, 809 S.W.2d 577, 587 (Tex. App.--Dallas 1991, writ denied); O'Reilly v. Grafham, 797 S.W.2d 399, 400 (Tex. App.--Austin 1990, no writ); Winograd v. Willis, 789 S.W.2d 307, 312 (Tex. App.--Houston [14th Dist.] 1990, writ denied); Shell Pipeline Corp. v. Coastal States Trading, Inc., 788 S.W.2d 837, 849 (Tex. App.--Houston [1st Dist.] 1990, writ denied); Champion v. Wright, 740 S.W.2d 848, 857 (Tex. App.--San Antonio 1987, writ denied); Wolfe, 712 S.W.2d at 229. This demonstrates a failure to adopt the rate required by article 5069-1.05 (the rate published in the Texas Register) because that rate varied six percentage points over the same period of time. [↑](#footnote-ref-134)
134. 133 Cavnar stated: "Prejudgment interest shall accrue at the prevailing rate that exists on the date judgment is rendered according to the provisions of [art. 5069-1.05, section 2]." Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985). The version of article 5069-1.05 relied upon in Cavnar as well as subsequent versions adopt the use of a readily available index upon which prejudgment interest rates should be based. See Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 2. Current article 5069-1.05, section 2 states in part:

     All judgments . . . of the courts of this state earn interest, compounded annually, at the rate published by the consumer credit commissioner in the Texas Register. The consumer credit commissioner shall compute on the 15th day of each month the judgment interest rate by taking the auction rate quoted on a discount basis for 52-week treasury bills issued by the United States government . . . .

     Id.

     The statute also provides for a minimum rate of 10% and maximum rate of 20% whenever the published rate falls below or rises above these parameters. Id. Nevertheless, it remains questionable whether this section or any other section of article 5069-1.05 applies to commercial disputes. Refer to subpart V(C) supra for a complete discussion on the breadth of article 5069-1.05. [↑](#footnote-ref-135)
135. 134 Dayton B. Parcells III, California Supreme Court Survey: A Review of Decisions: June 1985-August 1985, 13 Pepp. L. Rev. 427, 556 (1986) (citing Redevelopment Agency v. Gilmore, 700 P.2d 794 (Cal. 1985) (en banc)). [↑](#footnote-ref-136)
136. 135 See Rothschild, supra note 9, at 221 n.170 (noting the Internal Revenue Code's use of an adjusted prime rate set by the average predominant prime rate to calculate interest on deficiencies and overpayments of federal taxes); Wilson et al., supra note 12, at 118 (noting the use of the Federal Reserve Board discount rate and yields on short-term treasury bills in some jurisdictions); Wong, supra note 28, at 238 (arguing for a floating prejudgment interest rate tied to the three month treasury bill rate). [↑](#footnote-ref-137)
137. 136 Wilson et al., supra note 12, at 118. [↑](#footnote-ref-138)
138. 137 Id. [↑](#footnote-ref-139)
139. 138 Keir & Keir, supra note 9, at 150-52. These authors propose looking to the plaintiff's actual individual cost of borrowing or historical return on investment to identify the appropriate maximum interest rate that may be awarded. Id. at 150. [↑](#footnote-ref-140)
140. 139 Likewise, basing the cost to defendants on the investment savvy of their victims seems equally preposterous. [↑](#footnote-ref-141)
141. 140 To further facilitate equitable prejudgment interest awards, the court should use multiple interest rates rather than the single prevailing rate at the time of the judgment. To facilitate this, the interest rate should be computed on the 15th day of each month as outlined in Article 5069-1.05 section 2. The court should then calculate the precise prejudgment interest award by applying the historical rate that applied during each of the months between the date of injury and the date of judgment. Thus, for example, if the accrual period is six months, the court should calculate the prejudgment interest award by multiplying the amount of damages (other than future and punitive) by the historical rate for each of those six months. These monthly interest amounts should then be summed to derive the total prejudgment interest award. Thus:

     [SEE TABLE IN ORIGINAL] [↑](#footnote-ref-142)
142. 141 Article 5069-1.05 imposes a 10% floor and 20% ceiling on the interest rate. Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 2. [↑](#footnote-ref-143)
143. 142 Refer to Part IV supra for a discussion of the purposes of and justifications for prejudgment interest. [↑](#footnote-ref-144)
144. 143 McDivitt, supra note 115, at 341. [↑](#footnote-ref-145)
145. 144 Id. [↑](#footnote-ref-146)
146. 145 A $ 1,000,000 damage award that earns 10% annual simple interest over a 5 year period will accumulate $ 500,000 in total interest. That same award, if compounded annually for 5 years, will accumulate $ 610,510 in total interest. The simple and compound interest formulas are as follows:

     Simple interest: I = Prt

     Where:

     I = Interest

     P = Principal amount

     r = Interest rate

     t = Time of investment

     I = $ 1,000,000 x 10% x 5 = $ 500,000

     McDivitt, supra note 115, at 341, n.29.

     Compound Interest: S = P (1 + r)n

     Where:

     S = Total award (principal interest)

     P = Principal amount

     r = Interest rate

     n = Number of compounding periods

     S - P = Total interest

     S = $ 1,000,000 (1.10)5 = $ 1,610,510

     Total interest = $ 1,610,510 - $ 1,000,000 = $ 610,510.

     Id. at 336 n.7. It is important to note how the passage of time increases the disparity between the amount of interest earned under a simple versus a compound formula. Id. at 343; see also Keir & Keir, supra note 9, at 146 (explaining that the potential appreciation of a damage award can be enormous because interest grows exponentially over time).

     It is also critical to identify the variance that results from compounding on a daily rather than annual basis. Application of the compounding formula above illustrates that annual compounding results in interest equalling $ 610,510, while daily compounding over the same 5 year period yields $ 636,702 of interest. When compounding interest more frequently than once a year, increase n to the desired number of periods in which the interest will be compounded (i.e., daily compounding equals 365 compounding periods per year multiplied by the number of years) and divide r by the number of compounding periods per year. For example, if:

     P = $ 1,000,000

     r = 10% compounded daily

     Time = 5 years

     then:

     r = 10% / 365 days = .000274

     n = 365 x 5 years = 1825 total compounding periods

     thus:

     S = $ 1,000,000 (1.000274)1825 = $ 1,636,702

     Interest amount = $ 1,636,702 - $ 1,000,000 = $ 636,702. [↑](#footnote-ref-147)
147. 146 E.g., City of Houston v. Wolfe, 712 S.W.2d 228, 230 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd). [↑](#footnote-ref-148)
148. 147 See Mark P. Brewster, Note, Prejudgment Interest in Texas Contract Cases Limited to Six Percent Statutory Rate Unless Otherwise Specified in Contract, 18 St. Mary's L.J. 633, 650 (1986) (asserting that compounding imposes a burden on defendants who are trying to determine how much interest is owed and thereby creates overall uncertainty). Others have similarly commented on the difficulty of calculating compounded interest. See, e.g., Bowles & Whelan, The Law of Interest: Dawn of a New Era, 64 Canadian B. Rev. 142, 143-44 (1986) (stating that compounded interest creates formidable challenges because it is difficult to calculate); Cloud, supra note 16, at 411 (arguing that daily compounded interest is actually more of "a punitive measure disguised as a compensatory device" than an expression of the goals of awarding prejudgment interest enunciated in Cavnar). This argument seems greatly exaggerated. A comparison of the simple and compound interest formulas in note 145, supra, illustrates the relative simplicity of both. It seems, therefore, that one who is capable of applying the simple interest formula could also successfully apply the compound interest formula. [↑](#footnote-ref-149)
149. 148 See Wong, supra note 28, at 232 (noting that compound interest is commonly used in the daily business of banks and other lending institutions). Wong concludes that allowing compound interest would recognize the established reality of the marketplace. Id. at 239; see also Keir & Keir, supra note 9, at 145 (asserting that compound interest can now be earned on a wide array of investment instruments and an individual plaintiff would more than likely invest his money in compounding interest investments); Kotara, supra note 40, at 311-12 (inferring from the holding in Cavnar that the court believed daily compounding would make prejudgment interest competitive with the financial markets, thereby reducing the incentive to delay). Some proponents of compound prejudgment interest also note the lost opportunity cost inherent in awarding simple interest. See, e.g., Keir & Keir, supra note 9, at 152 (concluding that only compound interest can adequately reflect an injured plaintiff's true opportunity cost). [↑](#footnote-ref-150)
150. 149 696 S.W.2d 549, 554 (Tex. 1985) (concluding that the need to wholly restore injured plaintiffs and the need for imposing equity and symmetry in the law mandate that prejudgment interest be compounded daily). [↑](#footnote-ref-151)
151. 150 Compare City of Houston v. Wolfe, 712 S.W.2d 228, 229 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd) (concluding that prejudgment interest shall be compounded on a daily basis and that under Cavnar the compounding period is no longer at the trial court's discretion) with OKC Corp. v. UPG, Inc., 798 S.W.2d 300, 308 (Tex. App.--Dallas 1990, writ denied) (calling the Wolfe court's conclusion "misguided" and holding that Cavnar's use of the word "may" connotes the discretionary rather than mandatory nature of compounding). [↑](#footnote-ref-152)
152. 151 See, e.g., Law Offices of Moore & Assocs. v. Aetna Ins. Co., 902 F.2d 418, 422 (5th Cir. 1990); Farmland Indus., Inc. v. Andrews Transp. Co., 888 F.2d 1066, 1068 (5th Cir. 1989); Concorde Limousines, Inc. v. Moloney Coachbuilders, Inc., 835 F.2d 541, 550 (5th Cir. 1987); CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc., 809 S.W.2d 577, 587 (Tex. App.--Dallas 1991, writ denied); O'Reilly v. Grafham, 797 S.W.2d 399, 401 (Tex. App.--Austin 1990, no writ); Winograd v. Willis, 789 S.W.2d 307, 312 (Tex. App.--Houston [14th Dist.] 1990, writ denied); Shell Pipeline Corp. v. Coastal States Trading, Inc., 788 S.W.2d 837, 848-49 (Tex. App.--Houston [1st Dist.] 1990, writ denied); Champion v. Wright, 740 S.W.2d 848, 857 (Tex. App.--San Antonio 1987, writ denied).

     Despite the sizeable number of decisions that advocate the use of daily compounding, it is insightful to note a recent Fifth Circuit opinion that refused to compound a prejudgment award on a daily basis by arguing that the portion of the court's opinion in Moore & Associates allowing daily compounding was mere dicta. See Guest v. Phillips Petroleum Co., 981 F.2d 218, 223 (5th Cir. 1993) (citing Moore & Assocs., 902 F.2d at 422. [↑](#footnote-ref-153)
153. 152 Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 2; see, e.g., Sadler v. Duvall, 815 S.W.2d 285, 294 (Tex. App.--Texarkana 1991, writ denied) (choosing to apply the language of section 2 requiring annual compounding); OKC Corp., 798 S.W.2d at 308 (affirming the trial court's application of section 2). These references to section 2, which may have been intended to apply only to postjudgment interest, further raise a question of its applicability to prejudgment interest. Refer to note 108 supra and accompanying text for a more detailed discussion of this issue. [↑](#footnote-ref-154)
154. 153 Crocker Nat'l Bank v. Ideco Div. of Dresser Indus., Inc., 739 F. Supp. 338 (S.D. Tex. 1990). [↑](#footnote-ref-155)
155. 154 Id. at 341. [↑](#footnote-ref-156)
156. 155 See id. (awarding simple rather than compounded interest because, in the court's opinion, it was sufficient to fully compensate the plaintiff). [↑](#footnote-ref-157)
157. 156 See Keir & Keir, supra note 9, at 145 (noting that injured plaintiffs would have been able to invest their money at compound rates and concluding that a refusal to award compound interest encourages delay because defendants are able to earn compound interest but are only required to pay simple interest). [↑](#footnote-ref-158)
158. 157 See id. (reasoning that the wide availability of investments paying compounded interest insures that plaintiffs could avail themselves of such investments). [↑](#footnote-ref-159)
159. 158 See id. at 129 (commenting on the arbitrary nature of awarding simple interest in an environment where even the most conservative investments earn compound interest). [↑](#footnote-ref-160)
160. 159 See 26 U.S.C. section 6622 (1988). [↑](#footnote-ref-161)
161. 160 See McDivitt, supra note 115, at 341 (noting that differing compound interest accrual periods not only change the amount of interest earned on the principal but also change the amount of the principal itself, thereby causing an even greater effect on the total judgment). [↑](#footnote-ref-162)
162. 161 Crown Cent. Petroleum Corp. v. National Union Fire Ins. Co., 768 F.2d 632, 634 (5th Cir. 1985). The court in Cavnar adopted the arbitrary accrual period. Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985). [↑](#footnote-ref-163)
163. 162 Rothschild, supra note 9, at 218-19; see also Oyos, supra note 14, at 508 (arguing that to achieve full compensation, prejudgment interest should begin to accrue from the date the cause of action arises). [↑](#footnote-ref-164)
164. 163 See Cavnar, 696 S.W.2d at 555 (claiming that allowing interest to accrue from the date of the injury results in overcompensating plaintiffs and punishing defendants). [↑](#footnote-ref-165)
165. 164 Wilson et al., supra note 12, at 116; see also Rothschild, supra note 9, at 219 (commenting on the inability of a defendant to stop the accrual of interest prior to the suit actually being filed). [↑](#footnote-ref-166)
166. 165 Wilson et al., supra note 12, at 116; see also Cloud, supra note 16, at 408 (arguing for an accrual period that begins upon notice to the defendant because defendants in personal injury and wrongful death actions cannot possibly determine the full extent of their liability prior to trial). Cloud also observes that because of the discovery rule's ability to toll the statute of limitations, plaintiffs can go years before filing a claim, thus allowing prejudgment interest to accrue for extended periods of time before the defendant is even aware of a possible law suit. Id. at 409. [↑](#footnote-ref-167)
167. 166 Rothschild, supra note 9, at 218-19. [↑](#footnote-ref-168)
168. 167 Oyos, supra note 14, at 508; Rothschild, supra note 9, at 219. [↑](#footnote-ref-169)
169. 168 See Londrigan & Smith, supra note 55, at 44 (concluding that accrual periods beginning from the date of filing will simply result in plaintiffs' filing "early and often"); Oyos, supra note 14, at 508 (commenting on the potential haste with which plaintiffs may act to trigger the accrual period). [↑](#footnote-ref-170)
170. 169 Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555 (Tex. 1985). The court decided that in survival actions the accrual period would begin to run from either the date of death or six months after the date of the injury, whichever yields the larger interest award. Id. [↑](#footnote-ref-171)
171. 170 Id. at 554-55 (meaning that actual damages to a plaintiff are sustained throughout the prejudgment period). [↑](#footnote-ref-172)
172. 171 See Cavnar, 696 S.W.2d at 555 (commenting on the arbitrary nature of all accrual methods); Commonwealth Lloyd's Ins. Co. v. Thomas, 825 S.W.2d 135, 150 (Tex. App.--Dallas 1992) (noting the arbitrary nature of the accrual periods developed by the Cavnar court), vacated, 843 S.W.2d 486 (Tex. 1993); Kotara, supra note 40, at 306 (stating that the court in Cavnar "adopted admittedly arbitrary accrual methods"). [↑](#footnote-ref-173)
173. 172 Cavnar, 696 S.W.2d at 555. [↑](#footnote-ref-174)
174. 173 Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6(a). [↑](#footnote-ref-175)
175. 174 See, e.g., Tracy v. Annie's Attic, Inc., 840 S.W.2d 527, 540 (Tex. App.--Tyler 1992, writ denied) (affirming the trial court's use of the Cavnar six month waiting period in computing the prejudgment interest award); Gunter Hotel, Inc. v. Buck, 775 S.W.2d 689, 698 (Tex. App.--San Antonio 1989, writ denied) (following the Cavnar rule in a contract suit against an architect and commencing accrual of interest six months after the breach). [↑](#footnote-ref-176)
176. 175 See, e.g., Crown Cent. Petroleum Corp. v. National Union Fire Ins. Co., 768 F.2d 632, 638 (5th Cir. 1985) (opining that the Cavnar accrual rules are specifically limited to wrongful death, survival, and personal injury actions); Associated Tel. Directory Publishing, Inc. v. Five D's Publishing Co., 849 S.W.2d 894, 900 (Tex. App.--Austin 1993, no writ) (holding that Cavnar's six month delay rule does not apply in conversion cases); Security Sav. Ass'n v. Clifton, 755 S.W.2d 925, 935 (Tex. App.--Dallas 1988, no writ) (refusing to apply the Cavnar six month delay accrual period in a conversion case). [↑](#footnote-ref-177)
177. 176 Tex. Rev. Civ. Stat. Ann. art. 5069-1.03; id. art. 5069-1.05. [↑](#footnote-ref-178)
178. 177 Id. art. 5069-1.03 (using both the date of injury and an arbitrary date). [↑](#footnote-ref-179)
179. 178 Id. art. 5069-1.05 (combining the date of petition method with the Cavnar 180 day rule). [↑](#footnote-ref-180)
180. 179 This means that a defendant who has full use of the funds prior to an adverse judgment will technically be able to earn precisely the amount that he will be required to pay. [↑](#footnote-ref-181)
181. 180 It is important to remember that applicable statutes of limitation will preclude plaintiffs from unreasonably delaying the initiation of their lawsuits. In Texas, statutes of limitations are generally controlled by several provisions in the Civil Practice and Remedies Code. The contractual limitations period is four years. Tex. Civ. Prac. & Rem. Code Ann. section 16.004 (Vernon 1986). For tort and wrongful death actions, the limitations period is two years. Id. section 16.003. [↑](#footnote-ref-182)
182. 181 Missouri Pac. R.R. v. Lemon, 861 S.W.2d 501, 529 (Tex. App.--Houston [14th Dist.] 1993, writ granted). [↑](#footnote-ref-183)
183. 182 Cavnar, 696 S.W.2d at 556; see also Missouri Pac. R.R., 861 S.W.2d at 530 (stating that interest cannot be awarded until damages are actually sustained); Londrigan & Smith, supra note 55, at 16-17 (asserting that future damages clearly cannot qualify for prejudgment interest because these damages have not yet accrued as of the date of trial). [↑](#footnote-ref-184)
184. 183 See Wong, supra note 28, at 237 (declaring that an award of prejudgment interest on future damages is inconsistent with the theory of prejudgment interest). Wong adds that eliminating prejudgment interest on future damages effectuates the express purpose of prejudgment interest which is to compensate, not overcompensate the plaintiff. Id. at 240. The court in Lemon expressly confirmed that section 6 of the 1987 amendment to article 5069-1.05 does not authorize prejudgment interest on future damages. Lemon, 861 S.W.2d at 530. [↑](#footnote-ref-185)
185. 184 C & H Nationwide, Inc. v. Thompson, 37 Tex. S. Ct. J. 1059, 1066 (1994). [↑](#footnote-ref-186)
186. 185 Id. at 1067 (noting that this reasoning was also consistent with the holdings of many state appellate courts). Article 5069-1.05, section 6(a) reads in relevant part: "Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest." Tex. Rev. Civ. Stat. Ann. art. 5069-1.05, section 6(a). [↑](#footnote-ref-187)
187. 186 Thompson, 37 Tex. S. Ct. J. at 1067. [↑](#footnote-ref-188)
188. 187 Id. The court posited that such an expansive interpretation of the word "interest" was intended by the legislature in recognition of the role prejudgment interest plays in encouraging settlement negotiations. Id. It seems likely, however, that awarding interest on damages that have not yet been incurred coerces, rather than encourages, defendants to settle. [↑](#footnote-ref-189)
189. 188 Justice Hecht, in dissent, highlighted the illogical nature of awarding interest on future damages by noting the majority's own concession that such an award is not logical, linguistically or legally. Id. at 1071 (Hecht, J., dissenting); see id. at 1067 (stating that awarding interest on future damages "sacrifices a certain purity of meaning" and that the statute's structure suggests that the legislature did not use the term "interest" in a logical or legalistic way). Justice Hecht further argued that "few lawyers, and even fewer nonlawyers, . . . would not be startled by the idea that interest can accrue on money that has never been advanced and is not yet due." Id. at 1072. Justice Hecht concluded that granting such interest results in awards that exceed the damages actually suffered. Id. [↑](#footnote-ref-190)
190. 189 This was the precise query answered by the jury in Thompson. Id. at 1072. Of course, this type of jury question also inherently results in the inclusion of prejudgment interest on past damages because the time value of money--the prejudgment interest earned--is already incorporated into the question. Thus, adding prejudgment interest to any judgment award based on a jury charge specifically requesting an amount based in today's dollars seems duplicative. This reasoning seems to provide substantial fodder for defendants seeking to refute the equitable nature of a specific award of prejudgment interest. [↑](#footnote-ref-191)
191. 190 Thompson was a five to four decision on the issue of prejudgment interest on future damages. See id. at 1060. The Fifth Circuit recognized and applied the Texas Supreme Court's view on prejudgment interest for future damages when it recently overturned a district court's award of prejudgment interest that only incorporated interest on past damages. Harris v. Mickel, 15 F.3d 428, 430 (5th Cir. 1994). [↑](#footnote-ref-192)
192. 191 Tex. Civ. Prac. & Rem. Code Ann. section 41.006 (Vernon Supp. 1994) ("Prejudgment interest may not be assessed or recovered on an award of exemplary damages."). This section was added to the Code in 1987. Id. [↑](#footnote-ref-193)
193. 192 Ellis County State Bank v. Keever, 37 Tex. S. Ct. J. 1117, 1122-23 (1994). [↑](#footnote-ref-194)
194. 193 See Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 556 (Tex. 1985) (limiting recovery of prejudgment interest to accrued damages). The Cavnar court did not have the benefit of statutory preclusion of prejudgment interest on exemplary damages when it made its decision in 1985. [↑](#footnote-ref-195)
195. 194 Id. at 555 (relying partially on the virtually unanimous consensus among commentators advocating that prejudgment interest should not be awarded on punitive damages). Rothschild echoed this view by stating that punitive damages are intended to deter conduct, not to compensate plaintiffs. Rothschild, supra note 9, at 220. In the supreme court's most recent refusal to award prejudgment interest on punitive damages, the court recognized the inherently penal character of punitive damages. Keever, 37 Tex. S. Ct. J. at 1123-24 (noting that such damages should not be enlarged without express legislative intent). [↑](#footnote-ref-196)
196. 195 Cavnar, 696 S.W.2d at 556. [↑](#footnote-ref-197)
197. 196 Tex. Civ. Prac. & Rem. Code Ann. section 41.006. [↑](#footnote-ref-198)
198. 197 Refer to the proposed statutory amendment in Part VIII infra for the specific suggested wording of such a provision. [↑](#footnote-ref-199)
199. 198 Tex. Rev. Civ. Stat. Ann. art. 5069-1.01(d) (Vernon 1987). [↑](#footnote-ref-200)
200. 199 E.g., Najarro v. SASI Int'l, Ltd., 904 F.2d 1002, 1005 (5th Cir. 1990); Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982); Wiley-Reiter Corp. v. Groce, 693 S.W.2d 701, 703 (Tex. App.--Houston [14th Dist.] 1985, no writ); Bray v. McNeely, 682 S.W.2d 615, 617 (Tex. App.--Houston [1st Dist.] 1984, no writ). [↑](#footnote-ref-201)
201. 200 Note especially the requirement in (a) of "a loan of money." Clearly, damage awards do not constitute the repayment of a loan of money. Neither can a potential lawsuit with damages constitute an absolute obligation. [↑](#footnote-ref-202)
202. 201 See, e.g., Olson v. Bayland Publishing, Inc., 781 S.W.2d 659, 666-67 (Tex. App.--Houston [1st Dist.] 1989, writ denied) (holding that awards of prejudgment interest were both statutorily and constitutionally limited to 6% despite legislation granting 10% prejudgment interest); Moore v. White Motor Credit Corp., 708 S.W.2d 465, 468 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (ruling that a pleading demanding sums including unearned interest constitutes a "charge" of interest under the Texas usury statutes), overruled by Carpet Servs., Inc. v. George A. Fuller Co., 802 S.W.2d 343 (Tex. App.--Dallas 1990), aff'd, 823 S.W.2d 603 (1992); Rick Furniture Distrib. Co v. Kirlin, 634 S.W.2d 738, 740 (Tex. App.--Dallas 1982, writ ref'd n.r.e.) (holding that the plaintiff's original petition demanding an unearned price differential constituted a "charging" and was therefore usurious under the Texas usury statutes), overruled by Carpet Servs., Inc. v. George A. Fuller Co., 802 S.W.2d 343 (Tex. App.--Dallas 1990), aff'd, 823 S.W.2d 603 (1992); Nationwide Financial Corp. v. English, 604 S.W.2d 458, 461 (Tex. Civ. App.--Tyler 1980, writ dism'd) (holding that a counterclaim seeking to recover unearned interest amounted to charging usurious interest); Moore v. Sabine Nat'l Bank, 527 S.W.2d 209, 211-12 (Tex. Civ. App.--Austin 1975, writ ref'd n.r.e.) (holding that a demand for unearned finance charges as a matter of law amounted to a usurious charging of interest). [↑](#footnote-ref-203)
203. 202 863 S.W.2d 438, 440 (Tex. 1993). [↑](#footnote-ref-204)
204. 203 Id. [↑](#footnote-ref-205)
205. 204 Article XVI, section 11 of the Texas Constitution discusses usury and reads in part:

     The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per centum (6%) per annum.

     Tex. Const. art. XVI, section 11. [↑](#footnote-ref-206)
206. 205 Sage St., 863 S.W.2d at 440 n.3 (noting the inapplicability of article XVI, section 11 to prejudgment interest and expressly disapproving the contrary holding in Olson v. Bayland Publishing Inc., 781 S.W.2d 659 (Tex. App.--Houston [1st Dist] 1989, writ denied)). The court reasoned that prejudgment interest is awarded by a judge, not derived from a contract. Id. The court continued by contrasting the purpose of antiusury laws--to prevent the abusive practices in consumer and commercial credit transactions--with the function of prejudgment interest--to compensate plaintiffs for the delay between the date of injury and the date of judgment. Id. At least one federal court has relied on the Sage Street repudiation of article XVI, section 11 in the prejudgment interest context. Axelson, Inc. v. McEvoy-Willis, 7 F.3d 1230, 1234 (5th Cir. 1993) (concluding that article XVI, section 11 is inapplicable to prejudgment interest rates that are set by courts and was intended to apply to commercial lending and credit transactions). [↑](#footnote-ref-207)
207. 206 Sage St., 863 S.W.2d at 440. [↑](#footnote-ref-208)
208. 207 Id. [↑](#footnote-ref-209)
209. 208 See, e.g., Federal Sav. & Loan Ins. v. Kralj, 968 F.2d 500, 505 (5th Cir. 1992) (holding that the plaintiff's demand for interest in his pleadings did not constitute an unlawful charge of interest for purposes of the state usury laws); George A. Fuller Co. v. Carpet Servs., Inc., 823 S.W.2d 603, 603 (Tex. 1992) (refusing to hold that a petition constitutes a charging or demand of interest); Crain v. San Jacinto Sav. Ass'n, 781 S.W.2d 638, 639 (Tex. App.--Houston 1989, writ dism'd) (concluding that a motion does not constitute a charging of usurious interest). [↑](#footnote-ref-210)
210. 209 The court in Missouri-Kansas-Texas R.R. v. Fiberglass Insulators, 707 S.W.2d 943, 951 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.), delivered a pointed assessment on this issue by stating that "the law should not embarrass itself by appearing to create a right to high prejudgment interest rates and then furiously impose Draconian penalties and forfeitures on those bold enough to ask for it." [↑](#footnote-ref-211)
211. 210 The underlined text represents proposed additions to article 5069-1.05 and the text which is struck represents proposed deletions from that statute. [↑](#footnote-ref-212)