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This article considers whether the recent legislative changes to the judgment interest rules, which affect all cases "subject to appeal" on the effective date, have any impact on cases already on appeal at that time. It concludes that the legislation may apply to cases in which a notice of appeal may be timely filed after the effective date. It does not apply to appeals that were already pending when the legislation went into effect.[1]

Money judgments in Texas must specify a postjudgment interest rate.[2] The rate for judgments (other than on a contract)[3] is set forth in section 304.003 of the Finance Code.[4] House Bills 2415 and 4 changed the manner of computing that rate.[5] Because two versions of this Amendment were passed in the Legislature on the same day, June 1, 2003, with both adopting corrections on the same day, June 2, 2003, there may be some question about which bill is the law. These amendments contain the same substantive language, but different effective dates (June 20 and September 1, respectively). Thus, depending on which bill controls, there is a 71-day difference in which a party could receive the benefit or consequence of the new rate.

Which Bill Applies?

When two amendments to the same statute are passed in the same session of the legislature without reference to each other, "the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails."[6] Since the substantive content of article 6 of HB 4 and HB 2415 is identical, they may be harmonized simply by making the amendment effective June 20, 2003 and again on September 1, 2003.

In the event the different effective dates are deemed to create an irreconcilable conflict, the effective date turns on the date of enactment, which is "the date on which the last legislative vote is taken on the bill enacting the statute."[7] If the legislative records fail to disclose the order in which the votes were taken, the date of enactment, in order of priority, is: "(1) the date on which the last presiding officer signed the bill; (2) the date on which the governor signed the bill; or (3) the date on which the bill became law by operation of law."[8]

The House and Senate Journals reflect the following chronology:

(1) on June 1, 2003, the House first voted on HB 2415, which passed by a super-majority; later in the day, the House voted on HB 4, which also passed;[9]

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[1] *See Columbia Med. Ctr. v. Bush*, 2003 WL 22725001 (Tex. App.—Fort Worth Nov. 20, 2003, no pet. h.).

[2] TEX. FIN. CODE § 304.001.

[3] The postjudgment interest rate for contract cases has not changed; it remains the lesser of the rate specified in the contract or 18%. *Id.* § 304.002.

[4] *Id.* § 304.003.

[5] Postjudgment Interest Rate Act, 78th Leg., R.S., ch. 676, 2003 Tex. Sess. Law Serv. ch. 676 (Vernon) (codified at TEX. FIN. CODE § 304.003(c)) ("House Bill 2415"); Reform of Certain Procedures and Remedies in Civil Actions Act, 78th Leg., R.S., ch. 204, art. 6 § 6.01, sec. 304.003(c), 2003 Tex. Sess. Law Serv. ch. 204 (Vernon) ("House Bill 4").

[6] TEX. GOV'T CODE § 311.025(b).

[7] *Id.* §311.025(d).

[8] *Id.* § 311.025(e).

[9] H.J. of TEX., 78th Leg., R.S. 5644, 6041 (2003). While the Journals reflect the order in which events occurred in the House or in the Senate, they do not state the time of day. Thus, it is not possible to know whether a certain vote in the *House* preceded or followed a vote in the *Senate* on the same day. Likewise, the Journals do not disclose the order in which bills signed on the same day were signed or which house signed it first.

(2) on June 1, 2003, the Senate first voted on HB 4, which passed; and then voted on HB 2415, which passed by a super-majority;[10]

(3) on June 2, 2003, the House approved the technical amendments to HB 4, before those for HB 2415 (both by non-record votes);[11]

(4) on June 2, 2003, the Senate approved the technical amendments to HB 2415, before those for HB 4 (both by non-record votes);[12]

(5) on June 2, 2003, both bills were signed in both houses;[13]

(6) on June 11, 2003, HB 4 was signed by the Governor;[14]

(7) on June 20, 2003, HB 2415 was signed by the Governor.[15]

Because the legislative records do not disclose which vote was the last taken by which house, or which bill was signed last in either house, the enactment date is determined by the date each bill was signed by the Governor. HB 2415 is therefore the later-enacted provision, and the effective date of the amendment is June 20, 2003.

History of Judgment Interest Legislation

Previously, the judgment interest rate was calculated by reference to the "auction rate quoted on a discount basis for 52-week treasury bills issued by the United States government as most recently published by the Federal Reserve Board before the date of computation."[16] The reason for the amendment was that the Treasury Department no longer issues 52-week T–bills.[17] Accordingly, after some debate and compromise between competing House and Senate proposals, the following new language was adopted:

> (c) The postjudgment interest rate is:
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> (1) the prime rate as published by the Federal Reserve Bank of New York on the date of computation;
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> (2) five percent a year if the prime rate as published by the Federal Reserve Bank of New York described by subdivision (1) is less than five percent; or
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> (3) fifteen percent a year if the prime rate as published by the Federal Reserve Bank of New York described by subdivision (1) is more than fifteen percent.[18]

The immediate effect of that change was to reduce the postjudgment interest rate from 10% to 5%.[19] The effect of this rate change is magnified by the fact that in most instances, prejudgment interest is awarded at the same rate as the statutory postjudgment interest.[20]

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[10] S.J. of Tex., 78th Leg., R.S. 5008, 5038 (2003).

[11] H.J. of TEX., 78th Leg., R.S. 6616, 6659 (2003).

[12] S.J. of TEX., 78th Leg., R.S. 5088, 5094 (2003).

[13] H.J. of TEX., 78th Leg., R.S. 6665 (2003), S.J. of TEX., 78th Leg., R.S. 5115 (2003).

[14] H.J. of TEX., 78th Leg., R.S. 6671 (2003).

[15] H.J. of TEX., 78th Leg., R.S. 6672 (2003).

[16] TEX. FIN. Code § 304.003 (Historical and Statutory Notes).

[17] HOUSE COMM. ON FIN. INSTS., BILL ANALYSIS, H.B. 2415, 78th Leg., R.S. (2003). The last auction of 52-week treasury bills was held on February 27, 2001. Deputy Assistant Secretary of the Treasury for Federal Finance Michael J. Paulis Remarks at the February 2001 Treasury Quarterly Refunding, *available at* http://www.treas.gov/press/releases/ po115. htm. The last auction rate published by the Federal Reserve Board was apparently in June 2000. The postjudgment rate in Texas has been frozen at 10% since that time, despite falling interest rates in the market.

[18] TEX. Fin. CODE § 304.003.

[19] *See* 28 Tex. Reg. 8412 (2003) ("The judgment ceiling as prescribed by Sec. 304.003 for the period of 10/1/03 - 10/31/03 is 5% . . . ."); Tex. Office of Consumer Credit Comm'r Current Judgment Rate, *avail. at* www.occc.state.tx.us/pages/int_rates/ Index.html.

[20] *See* TEX. FIN. CODE § 304.103 (wrongful death,

Sadly, given the complexity of this issue already, a future amendment to this statute will probably be required because, effective August 1, 2003, the Federal Reserve Bank *of New York* stopped publishing a prime rate.[21] The Board of Governors of the Federal Reserve Bank actually establishes the prime rate. The historical rate for each day since August 4, 1955 is available at their website.[22]

Issue for the Appellate Courts

Both bills state, "The changes in law made by this Act apply in a case in which a final judgment is signed *or subject to appeal* on or after the effective date of this Act."[23] The question is which cases will be considered "subject to appeal" after the effective date of the statute. One view is that "subject to appeal" is equivalent to "appealable" or "capable of being appealed." The other view is that the phrase "subject to appeal" also means "pending on appeal."

Statutory Construction - Plain Language

The Code Construction Act requires that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage."[24] Words that have acquired a particular technical usage, by statutory definition or otherwise, are construed in accordance with that definition.[25] Since there are no statutory or other technical definitions of the phrase "subject to appeal," it should be interpreted in accordance with common usage.

In *Columbia Medical Center of Las Colinas v. Bush*, the Court reviewed several cases that examined the finality of an underlying order or judgment to determine whether it was "subject to appeal."[26] It concluded that, in the context of the amendment to Finance Code section 304.003(c), that language is used to describe a judgment that "fully and finally disposes of all parties and all issues before the trial court and is therefore capable of being appealed."[27] The Court held:

Thus, giving the statutory language its plain meaning, the amendments to finance code section 304.003(c) apply to cases where a judgment is signed on after [sic] the effective date of the Act and to cases where a judgment becomes subject to appeal, i.e., capable of being appealed, on or after the effective date of the Act.[28]

A number of statutes use the phrase "subject to appeal." Most of these simply recite that a particular decision of an administrator or court is or is not "subject to appeal." That language had not been interpreted by the courts.[29] The most instructive statute relates to the enforceability of a foreign judgment "that is final and conclusive and enforceable where rendered, even though an appeal is pending or the judgment is subject to appeal."[30] The use of the disjunctive "or" would suggest that a judgment "subject to appeal" is something different from one where "an appeal is pending." No cases have interpreted this language.

The *Columbia Medical Center* case and the use of identical language in other statutes suggests that the plain language of the phrase "subject to appeal" means "capable of being appealed."

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personal injury and property damage cases); *Johnson & Higgins of Texas, Inc. v. Kenneco, Inc.*, 962 S.W.2d 507, 532 (Tex. 1998) (equitable postjudgment interest at common law).

[21] *See* www.newyorkfed.org/aboutthefed/ faq.html (rates/releases).

[22] *See* www.federalreserve.gov/releases/h15/data/d/prime.txt.

[23] House Bill 2415 § 2(a) (emphasis added); House Bill 4 § 6.04 (substitutes the word "article" for the word "Act") (emphasis added).

[24] TEX. GOV'T Code §311.011(a).

[25] *Id.* § 311.011(b).

[26] 2003 WL 22725001, at *24 (Tex. App.—Fort Worth Nov. 20, 2003, no pet. h.). This is the only case to interpret the 2003 amendment to section 304.003(c) as of December 1, 2003.

[27] *Id.*

[28] *Id.*

[29] See, *e.g.*, TEX. CIV. PRAC. & REM. CODE § 172.054(d); TEX. BUS. & COMM. CODE § 17.62(c); *id.* § 15.10(j).

[30] TEX. CIV. PRAC. & REM. CODE § 36.002(a)(1).

Statutory Construction - Entire Statute

The Code Construction Act creates the presumption that the entire statute is intended to be effective.[31] Accordingly, the amended provision, section 304.003(c) of the Finance Code, should be read in conjunction with the rest of section 304.

In addition to the method of calculation, section 304.003 requires that money judgments, including costs and prejudgment interest, earn postjudgment interest.[32] It also says the following:

> (b) On the 15th day of each month, the consumer credit commissioner shall determine the postjudgment interest rate to be applied to a money judgment *rendered during the succeeding* calendar month.[33]

The consumer credit commissioner is directed to send the rate to the secretary of state and the secretary of state is directed to publish it in the Texas Register.[34] Courts are directed to take judicial notice of the published postjudgment interest rate.[35] These additional provisions, which were not amended by House Bill 2415 or House Bill 4, strongly suggest that the new judgment interest rate was *not* intended to apply to cases "in the pipeline," but, rather, only to new judgments.

The Consumer Credit Commissioner, who is charged with establishing and publishing the postjudgment interest rate for the State of Texas, takes the following position:

> The date the rate is computed by the agency is not changed. Section 304.003(b) of the Texas Finance Code directs the consumer credit commissioner to determine the postjudgment interest rate on the 15th day of each month; that rate is applied to a money judgment rendered by a Texas court during the succeeding calendar month. This subsection was not amended during the 78th Regular Legislative Session. The bill was signed after the fifteenth of June. Therefore, the first computation of the new postjudgment rate occurs July 15, 2003, for the month of August 2003. The postjudgment interest rate remains at the long-standing 10% through July 31, 2003.[36]

Under the Consumer Credit Commissioner's interpretation, the amended statute, while effective June 20, 2003, could not apply to judgments entered prior to August 1, 2003.

House Bills 2415 and 4 merely changed the method by which the Consumer Credit Commissioner must calculate the postjudgment interest rate, not the additional provisions that control the application of that rate to money judgments. An interpretation that makes the amendments applicable to all judgments already pending on appeal would render section 304.003(b) of the Finance Code (which was not amended) meaningless.

Statutory Construction - Just and Reasonable Result

The Code Construction Act also recognizes the presumption that in enacting a statute, a just and reasonable result was intended.[37] If the phrase "subject to appeal" in the amendments to Finance Code section 304.003(c) is interpreted to mean "pending on appeal," Pandora's Box truly will be opened. As the Court points out in the *Columbia Medical Center* case, such an interpretation "would mandate a recalculation of postjudgment interest in every single civil case involving a

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[31] TEX. GOV'T CODE § 311.021(2).

[32] TEX. FIN. CODE § 304.003(a).

[33] *Id.* § 304.003(b) (emphasis added).

[34] *Id.* § 304.004.

[35] *Id.* § 304.007.

[36] *New Postjudgment Rate Calculation*, pub. by Office of Consumer Credit Comm'r, *available at* http://www.occc.state.tx.us/pages/int_rates/judg.html.

[37] TEX. GOV'T CODE § 311.021(3).

money judgment pending on appeal in all fourteen courts of appeal as of June 20, 2003."[38]

In the absence of any specific legislative history, it must be presumed that the Legislature did not intend to add a new, unpreserved issue to every case involving a money judgment pending before every Texas court of appeals, the Texas Supreme Court, and federal courts applying Texas law. The court would have to determine when the new interest rate was to become effective for that case: when the parties raise the issue on appeal, or when the final judgment was entered below, or on the effective date of the amendment, or some other time. The court or the parties would have to research the appropriate rate given the date of application. This would involve motions, hearings and evidence in every case. The consequence would be appellate gridlock — surely an unreasonable result not intended by the Legislature.

Statutory Construction - Prospective v. Retrospective

The Texas Constitution has a specific prohibition against retroactive laws.[39] Accordingly, a Texas statutory enactment is "presumed to be prospective in its operation unless expressly made retrospective."[40]

> Texas law militates strongly against the retroactive application of laws. . . . Amendments are also presumed not to apply retroactively. Doubts as to retroactivity are resolved *against* the retroactive application of a statute.[41]

While an argument could be made that the phrase "subject to appeal" imposes some degree of retroactivity, it does not appear to be an "express" statement to the effect that all cases pending on appeal are subject to a recalculation of their judgment interest rates..

There is a wrinkle in the presumption against retroactivity. Changes in statutes affecting remedies or procedure *may* be applied retroactively.[42] Although postjudgment interest is remedial, this exception to the presumption should not come into play in the case of pending appeals. In an exhaustive opinion on the topic, the Supreme Court said:

> [R]etroactive laws have been upheld when no vested substantive right has been impaired but only the procedure or remedy has been changed. In such cases, the change *will not affect or invalidate steps previously taken in pending litigation*, but all subsequent proceedings will be governed by the new statute or rule as of its effective date, provided a reasonable time is afforded in which to act upon the new law.[43]

Thus in situations where postjudgment interest at the 10% rate was awarded and an appeal was perfected before section 304.003(c) was amended, that award should not be invalidated under this authority.

Statutory Construction - Legislative Intent

In construing a statute, a court is permitted to consider, among other things, the legislative history.[44] The legislative intent as to both HB 4

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[38] 2003 WL 22725001, at * 25.

[39] TEX. CONST. art. I § 16.

[40] TEX. GOV'T CODE § 311.022.

[41] *Pace v. Jordan*, 999 S.W.2d 615, 619 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (emphasis added) (citations omitted).

[42] *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997) (laws affecting remedies, such as the statute of limitations, are not unconstitutionally retroactive unless the remedy is entirely taken away, as long as the party has a reasonable time or fair opportunity to preserve her rights); *Holder v. Wood*, 714 S.W.2d 318, 319 (Tex. 1986); *Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648–49 (Tex. 1971) (retroactive laws may be upheld if the change is a remedy, not a right).

[43] *Ex parte Abell*, 613 S.W.2d 255, 260 (Tex. 1981) (emphasis added).

[44] TEX. GOV'T CODE § 311.023(3).

and HB 2415 is clear: the amendment is intended to be prospective in application.[45]

Statutory Construction - General Savings Clause

Texas has a general savings statute that applies whenever a statute is enacted, amended or appealed.[46] Under this savings statute, the amendment of a statute does not affect "(1) the prior operation of the statute or any prior action taken under it; or (2) any . . . right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under it; or . . . (4) any . . . proceeding, or remedy concerning any privilege, obligation, liability . . . and the proceeding, or remedy may be instituted, continued, or enforced . . . as if the statute had not been . . . amended."[47] When the trial court has entered a final, appealable judgment before a statutory amendment goes into effect, that constitutes action taken under the prior law, so section (a)(1) of the general savings statute bars application of the amended law to the case.[48]

Changes in Law/Preservation of Error

In the case of common law changes to the applicable law during the pendency of an appeal, there are two familiar doctrines of appellate review. First, under *Blair*, it is generally the rule that "[w]hen the applicable law changes during the pendency of the appeal, the court of appeals must render its decision in light of the change in the law."[49] Second, the *Allright* case holds that failure to preserve error on this point will preclude appellate review or "correction."[50]

Interestingly enough, the *Allright* case dealt with the application of the prejudgment interest rule set forth in *Cavnar v. Quality Control Parking*[51] to a case "in the pipeline" when it was decided. The Court said:

> The prejudgment interest rule in *Cavnar* is applicable to all future cases as well as those still in the judicial process. However, this court did not modify the procedural rules *nor did we dispense with the requirement of preserving errors*. Pearson did not complain to the trial court of its failure to award prejudgment interest nor did she assign a point of error or crosspoint in the court of appeals on this issue. Pearson waived any claim for prejudgment interest by failing to preserve her point of error on appeal.[52]

However, the *Blair* rule ordinarily does not apply in the context of statutory changes.[53] Rather, the presumptions of the Code Construction Act

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[45] *See* SEN. COMM. ON STATE AFFAIRS, BILL ANALYSIS, C.S.H.B. 4; 78th Leg., R.S. (2003) ("Section 6.04 [m]akes application of the changes in law made by this article prospective."); SEN. COMM. ON JURISPRUDENCE, BILL ANALYSIS, C.S.H.B. 2415; 78th Leg., R.S. (2003) ("Section 2.(a) [m]akes application of this Act prospective.").

[46] TEX. GOV'T CODE § 311.031(a).

[47] TEX. GOV'T CODE § 311.031(a); *see also Quick v. City of Austin*, 7 S.W.3d 109, 133 (Tex. 1999) (opinion on motion for rehearing).

[48] *See Bates v. Tesar*, 81 S.W.3d 411, 428 (Tex. App.—El Paso 2002, no pet.).

[49] *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993).

[50] *Allright, Inc. v. Pearson*, 735 S.W.2d 240, 240 (Tex. 1987) (unpreserved error is not before the appellate court and it is error for the court of appeals to consider unassigned points of error).

[51] 696 S.W.2d 549 (Tex. 1985).

[52] *Allright*, 735 S.W.2d at 240 (emphasis added).

[53] *See, e.g., Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 17 n.3 (Tex. 2000) (*Blair* inapposite because it did not involve a statute); *Pace v. Jordan*, 999 S.W.2d 615, 620 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (*Blair*, which involved the common law, does not apply in this statutory amendment case). *But see Am. Home Shield of Tex., Inc. v. Kortz*, 2000 WL 1262617, at *5 (Tex. App.—Houston [1st Dist.] Sept. 7, 2000, pet. dism'd) (not designated for publication) (applying a statutory amendment over objection on the authority of *Blair*); *cf. Phifer v. Nacogdoches County Cent. Appraisal Dist.*, 45 S.W.3d 159, 166–67 (Tex. App.—Tyler 2001, pet. denied) (applying statutory amendment explicitly made applicable to all pending actions pursuant to *Blair* rule).

should govern the application of statutory changes to pending cases.[54]

To the extent that a preservation requirement does apply, it is unlikely that this issue could be reviewed under a fundamental error theory. The longstanding rule on fundamental error in civil cases was set forth in an election law case, *Ramsey v. Dunlop*.[55] In that case, the Court held that, despite an amended statute requiring that error be preserved, it could still review "fundamental errors" that had not been assigned.[56] It defined fundamental error as "an error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state."[57] However, the Supreme Court drastically restricted the fundamental error doctrine in civil cases in *In re B.L.D.*[58] There the Court went to great lengths to explain the strong policy considerations favoring its preservation of error rules, pointing out that, in light of those rules, it has previously called fundamental error a "discredited doctrine."[59] The Court recognized only two situations in which it considered the fundamental error doctrine viable: subject matter jurisdiction issues and juvenile delinquency cases, because they are quasi-criminal.[60] The Court therefore refused to find fundamental error in a charge issue that resulted in the termination of parental rights.[61] It is, therefore, highly unlikely that the Court would extend fundamental error doctrine to "correct" the purely economic consequences of a remedial rule that, while properly applied at the time of judgment, has since been modified for practical reasons.

Conclusion

The amendments to article 304.003(c) of the Finance Code should only apply prospectively. Judgments that were signed after June 20, 2003 (or perhaps after August 1, 2003 according to the Office of Consumer Credit Commissioner), or judgments that were capable of being appealed after the effective date are subject to the new postjudgment interest rate calculation. The amendment should not be applied to modify the postjudgment interest rate in cases that already were pending on appeal when the new rate went into effect.

[54] *Cash America*, 35 S.W.3d at 17 n.3 (Code Construction Act governs construction of Finance Code, including question of retroactivity); *see also Columbia Med. Ctr.*, 2003 WL 22725001, at *25.

[55] 205 S.W.2d 979 (Tex. 1947).

[56] *Id.* at 983. The Court was clearly concerned that its failure to reach the issue presented might result in the election of a candidate who had not received a majority of the popular vote in clear violation of the public policy declared by the Texas Constitution. It therefore justified its decision by saying, "If our courts, in whom is imposed the judicial power of this state, cannot act of their own motion in such a situation, only because litigants whose personal interests are adverse to that public policy have waived the error, then the government of this state is indeed impotent." *Id.*

[57] *Id.*

[58] 113 S.W.3d 340 (Tex. 2003).

[59] *Id.* at 350 (citing *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982)).

[60] *Id.* at 350–51. The Court was considering the doctrine only in the civil context because different rules and considerations apply in criminal cases. *Id.* at 351 & n.10.

[61] *Id.* at 352.