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Texas's Excessive Demand Doctrine Impacts Recoveries in Litigation.

Stephanie M. Green

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RECENT DEVELOPMENT

TEXAS'S EXCESSIVE DEMAND DOCTRINE IMPACTS RECOVERIES IN LITIGATION

STEPHANIE M. GREEN*

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I. INTRODUCTION

A party who makes a demand for money he is not entitled to, either because it is done in bad faith or done unreasonably, becomes subject to the excessive demand doctrine.¹ The consequence of making such a demand is the denial of amounts in excess of the actual debt. Specifically, attorney's fees accrued in prosecution of the excessive claim are disallowed.² Because excessive demand is an affirmative defense,³ a defending party must allege its claim of excessive demand in its pleadings. A party must "plead it, prove it, and obtain findings of fact on its essential elements."⁴ To obtain findings on the issue, both pleadings and evidence supporting that an excessive demand was made are required to put a question or instruction before the jury.⁵ Ensuring that the evidence is sufficient to justify the instruction or question is raised in order to obtain findings depends upon the trial court—whose judgment will only be overturned upon a showing of abuse of discretion.⁶

Recognizing an excessive or unreasonable demand for payment (or settlement) will produce unnecessary runaway costs of litigation,⁷ Texas's

1. See *Hernandez v. Lautensack*, 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied) (indicating an excessive demand is made either unreasonably or is in bad faith). In a case from the Third Court of Appeals in Austin, a party's refusal to accept the actual amount due on a debt, failure to credit amounts paid to an account, and continued demand for payment greater than the amount owed by a debtor justified complete denial of attorney's fees. See *Wallace Roofing, Inc. v. Benson*, No. 03-11-00055-CV, 2013 WL 6459757, at *41 (Tex. App.—Austin, Nov. 27, 2013, pet. denied) (mem. op.) (concluding no abuse of discretion occurred when the evidence of the party's "excessive demand for payment and its actions indicated an unwillingness to accept the actual amount due on the account").

2. E.g., *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981) (establishing excessive demand precludes recovery of fees for subsequent litigation attempting to recover underlying debt).

3. If not affirmatively pled or tried by consent, a claim of excessive demand is waived. *Kurtz v. Kurtz*, 158 S.W.3d 12, 19 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Pratt v. Trinity Projects, Inc.*, 26 S.W.3d 767, 769 (Tex. App.—Beaumont 2000, pet. denied). The burden of proof and persuasion rest upon the party asserting an affirmative defense. WILLIAM V. DORSANEO, III ET AL., TEXAS CIVIL PROCEDURE: PRETRIAL LITIGATION § 6.06 (2014–2015 ed.).

4. *Hameed Agencies (Pvt) Ltd. v. J.C. Penney Purchasing Corp.*, No. 11-05-00140-CV, 2007 WL 431339, at *7 (Tex. App.—Eastland Feb. 8, 2007, pet. denied) (mem. op.); see also *Pratt*, 26 S.W.3d at 769 (discussing the pleading party must request and obtain findings on elements).

5. *Nat'l Lloyds Ins. Co. v. Lewis*, No. 09-13-00413-CV, 2015 WL 690807, at *12 (Tex. App.—Beaumont, Feb. 19, 2015, pet. filed) (mem. op.).

6. Compare *id.* (recognizing even if refusal to include an instruction or question was error, the appellate court would not reverse as it was not shown the error led to an improper judgment), *with Ware v. United Fire Lloyds*, No. 09-12-00061-CV, 2013 WL 1932812, at *3 (Tex. App.—Beaumont, May 9, 2013, no pet.) (mem. op.) (contending deference was proper and no abuse of discretion by the trial court in holding the attorney's fees claimed were excessive and unnecessary).

7. See Todd Tippett, *Texas Insurers: Don't Forget 'Excessive Demand Doctrine'*, LAW 360 (May 1, 2015, 7:23 AM), <http://www.law360.com/articles/649775/texas-insurers-don-t-forget-excessive->

excessive demand doctrine generally denies recovery of attorney's fees sought,⁸ as well as prejudgment interest.⁹ Recent cases have tested the breadth and applicability of Texas's excessive demand doctrine but have done so without establishing new or additional authority to guide future cases.¹⁰ One recent article urges insurance carriers to remember to assert excessive demand against inordinate policyholder claims.¹¹ Behind this call is the idea that insurance litigation surges as storms and natural disasters regularly besiege the Lone Star State, and the potential for unreasonable or excessive demands against insurers will inevitably increase.¹² Those demands impede swift resolution of claims. While one underlying purpose for awarding attorney's fees is the promotion of judicial efficiency, unreasonable demands undermine this end; the excessive demand doctrine then counters this outcome.¹³

Insurance litigation is not the only situation when excessive demand applies. Any time a demand is made in connection with a suit for money beyond what is actually owed, the defense may apply. Cases indicate a broad applicability of the doctrine. Excessive demand has been asserted in a range of cases from insurance claims to cases arising under the DTPA, contract, landlord tenant disputes, and even a child support modification matter.¹⁴ The rationale behind prohibiting recovery of attorney's fees is

demand-doctrine ("The purpose of the doctrine is judicial economy in that excessive and unreasonable demands cause unnecessary and excessive litigation costs, including attorneys' fees and court costs.").

8. *See, e.g., Kurtz v. Kurtz*, 158 S.W.3d 12, 21 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) ("A party must affirmatively assert excessive demand as a defense to a claim for attorney's fees.").

9. Section IV explores when a successful excessive demand defense vitiates the recovery of prejudgment interest.

10. *See Nat'l Lloyds Ins. Co.*, 2015 WL 690807, at *12 (overruling issue on appeal that excessive demand prevented attorney's fees award because no bad faith or unreasonable demand demonstrated); *Ware*, 2013 WL 1932812, at *3 (upholding the trial court's determination that attorney fees claimed were excessive and unreasonable but without deciding the applicability of excessive demand doctrine).

11. *See generally* Tippett, *supra* note 7 (encouraging utilization of excessive demand against unreasonable insurance claims).

12. *Id.*

13. *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 418 (Tex. App.—Corpus Christi 2001, pet. denied).

14. *See generally* *Wallace Roofing, Inc. v. Benson*, No. 03-11-00055-CV, 2013 WL 6459757 (Tex. App.—Austin, Nov. 27, 2013, pet. denied) (mem. op.) (applying the doctrine in case involving DTPA and contract claims); *Mossler v. Nouri*, No. 03-08-00476, 2010 WL 2133940 (Tex. App.—Austin May 27, 2010, pet. denied) (involving a landlord commercial tenant dispute); *Kurtz v. Kurtz*, 158 S.W.3d 12 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (examining the assertion of excessive demand on an appeal in child support modification related action); *Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (regarding a

especially appropriate when a contract includes payment of attorney's fees.¹⁵ A party resisting an excessive, unreasonable, or bad faith claim should not have to countenance such litigation tactics and risk of exposure to additional damages for failing to pay an excessive demand.¹⁶ However, the excessive demand doctrine benefits only parties that properly avail themselves to the defense. Issues will continue to arise under this affirmative defense to recovery of fees and interest until courts develop a more cohesive doctrine. An outline of the current state of jurisprudence is appropriate. Not only are many potential claims waived,¹⁷ a review of the Texas case law reveals that few parties assert excessive demand as against the recovery of prejudgment interest.¹⁸ This is a significant issue worthy of discussion as the last time the Texas Supreme Court specifically discussed whether excessive demand precludes an award of prejudgment interest was 1949.¹⁹ This was well before the era of tort reform and the statutory regime regarding attorney fee award requirements.

II. BACKGROUND AND HISTORY: EXCESSIVE DEMAND DOCTRINE EXPLAINED

The Texas Supreme Court has since clarified the doctrine of excessive demand in *Findlay v. Cave*.²⁰ The 1981 opinion provides the court's most recent binding authority on the defense. The court articulated the two-pronged requirements of excessive demand: a creditor must seek "more than the liquidated sum actually due on the instruments involved" and either refuse tender or make clear that tender of amounts due will be refused.²¹ In essence, there must be a claim for an ascertainable debt,²² a

breach of contract claim).

15. See *Wayne*, 52 S.W.3d at 418 (calling application in such a case "inherently logical").

16. See *id.* (citing *Allstate Ins. Co. v. Lincoln*, 976 S.W.2d 873, 878 (Tex. App.—Waco 1998, no writ) ("If the claiming party makes an unreasonable demand, the other party should not be forced to pay the demand or else risk suffering the opposing party's attorney's fees.")).

17. See, e.g., *Kurtz*, 158 S.W.3d at 20 (noting the failure to raise the affirmative defense is deemed waived).

18. Section IV clarifies this assertion at length.

19. See generally *Ingham v. Harrison*, 224 S.W.2d 1019, 1022 (Tex. 1949) (providing the reasoning for a denial of prejudgment interest as well as attorney's fees in case of excessive demand).

20. *Findlay v. Cave*, 611 S.W.2d 57 (Tex. 1981).

21. *Id.* at 58.

22. E.g., *Beauty Elite Grp., Inc. v. Palchick*, No. 14-07-00058-CV, 2008 WL 706601, at *4 (Tex. App.—Houston [14th Dist.] Mar. 18, 2008, no pet.) (mem. op.) (determining the limitation of applicability to a claim for a liquidated sum). While not listed anywhere as a stand-alone element, case law clearly requires a specified liquidated sum to raise the defense. *Id.* See also MICHOL O'CONNOR, O'CONNOR'S TEXAS CAUSES OF ACTION 1439 (2015) (outlining case law explication of excessive demand). When a claim is liquidated, the sum owed is ascertainable. See *Liquidated*,

wrongful demand for an amount greater than owed, and a refusal of the tender of amounts owed by the creditor.²³ In *Findlay*, the court analyzed two previous cases that form the longstanding basis of the doctrine, *Collingsworth v. King*²⁴ and *Ingham v. Harrison*.²⁵ The court affirmed an excessive demand on a liquidated claim discharges the debtor's liability for attorney's fees sought in litigation to recover payment: "A creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt."²⁶

Parties asserting or resisting the defense of excessive demand need to thoroughly understand the doctrine in order to zealously serve their clients. A creditor making an excessive demand is taking a serious gamble with his chances of recovery. To preserve recovery of fees outlined under a contract and the interest that accrues from prosecuting a non-paying party, it is paramount to understand the potential defenses to recovery. The stakes are considerably higher for the DTPA plaintiff who makes an excessive demand. The nature of a dispute can impact the potential for reversal on appeal.²⁷ Reversal rates in insurance cases have revealed a shift in favor of insurance carriers over policyholders.²⁸ Plaintiffs in tort and DTPA actions do disproportionately worse on appeal than defendants who prevail at the trial court level.²⁹ In an already increasingly perilous litigation climate, ensuring a recovery will not be overturned on appeal is a necessary consideration. As such, plaintiffs should be alert to the potential impact the excessive demand defense poses on recovery.

Parties wishing to utilize the defense of excessive demand ought to understand the lessons to be gleaned from current cases. Excessive demand can function as a powerful defense to recovery, provided it is properly raised and asserted at the trial level and the relevant factual

BLACK'S LAW DICTIONARY (10th ed. 2014) ("(Of an amount or debt) settled or determined, esp. by agreement.").

23. See *Tuthill v. Sw. Pub. Serv. Co.*, 614 S.W.2d 205, 212 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (recognizing from precedent that an excessive demand exists where "(1) the creditor wrongfully demands an amount in excess of that which he is due; and (2) the creditor either refuses, or clearly indicates that he will refuse, tender of the amount actually due").

24. *Collingsworth v. King*, 283 S.W.2d 30 (Tex. 1955).

25. *Ingham v. Harrison*, 224 S.W.2d 1019 (Tex. 1949).

26. *Findlay*, 611 S.W.2d at 58.

27. See Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 1017 (2012) ("Dispositions on appeal were affected not only by the procedural posture of the case, but also by the nature of the dispute.").

28. See *id.* at 1021 (surveying trends of reversal rates in Texas courts of appeals in insurance coverage cases).

29. See *id.* at 1017 (ascertaining plaintiffs do particularly poorly in Texas on appeal for DTPA and tort claims).

findings on the elements are made to support denial of attorney's fees and prejudgment interest.

III. FAILURE TO PROPERLY ASSERT ELEMENTS OF EXCESSIVE DEMAND DOOMS DEFENSE

A stunning lack of development exists in the discourse on excessive demand because numerous claims fail on appeal for being improperly attempted at the appellate level.³⁰ As a result, the same basic tenets of the defense are repeated throughout the cases.³¹ What constitutes excessive demand is a fact intensive inquiry.³² Deciding whether the evidence sufficiently supports the amount claimed is unpredictable. As a preliminary matter, there must be a wrongful demand for an amount in excess of the actual amount due the creditor.³³ This element depends on the facts and circumstances of each case.

A. *An Excessive Demand Is Unreasonable or One Made in Bad Faith*

The amount in dispute is not what classifies a demand as excessive. Rather than the amount of money claimed, the basis for the defense boils down to reasonableness and whether the claim is a bad faith one. "In considering whether a demand is excessive or not, the dollar amount is not by itself indicative. The dispositive inquiry . . . is whether the claimant acted unreasonably or in bad faith."³⁴ For example, an excessive demand

30. An affirmative defense is waived if not pled in the trial court or tried by consent of the parties. See *Beauty Elite Grp., Inc. v. Palchick*, No. 14-07-00058-CV, 2008 WL 706601, at *6 (Tex. App.—Houston [14th Dist.] Mar. 18, 2008, no pet.) (mem. op.) (recognizing a party's failure to preserve excessiveness by failing to assert the issue in live pleadings); *Kurtz v. Kurtz*, 158 S.W.3d 12, 21 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (determining excessive demand was neither affirmatively plead in trial court nor tried by consent); *Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 628 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (denying on appeal a previously un-asserted claim for excessive demand); *Pratt v. Trinity Projects, Inc.*, 26 S.W.3d 767, 769 (Tex. App.—Beaumont 2000, pet. denied) (noting precedent requires excessive demand to be affirmatively raised and findings obtained on required elements); *Tuthill v. Sw. Pub. Serv. Co.*, 614 S.W.2d 205, 212 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) ("In their live trial pleadings, the appellees did not affirmatively assert excessive demand as a defense to the claim for attorney's fees and prejudgment interest.")

31. See, e.g., *Tuthill*, 614 S.W.2d at 212 (describing the effect of a creditor's excessive demand on his claim for attorney's fees accrued in litigating the action for payment).

32. For a case that demonstrates the fact-intensive nature of a trial court's inquiry into whether a demand is excessive, see generally *Oyster Creek Financial Corp. v. Richwood Investments II Inc.*, 176 S.W.3d 307 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), which explains in detail the evidence and factors assessed by the jury.

33. *Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981).

34. *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 418 (Tex. App.—Corpus Christi 2001, pet. denied) (citing *Findlay*, 611 S.W.2d at 58).

arises when a party seeks to collect on amounts not owed or seeks appreciably more than the amount of money he is entitled.³⁵ On the other hand, a significant difference between the amount claimed and the amount awarded by the jury may be construed as reasonable when evidence supports a large portion of the sum demanded.³⁶ Ultimately, a jury award of an amount less than the amount sought by a claimant does not mean a demand is excessive; in certain instances, it may merely provide some evidence of excessive demand.³⁷ The jury's award is but one factor to consider. A jury is entitled to credit or discredit the evidence as it sees fit.³⁸ While the critical factor is whether a party can demonstrate a claim is unreasonable or made in bad faith, recognizing the difference can be vexing.³⁹ However, a party's pursuit of sums he is not entitled to collect generally supports a characterization of the demand as excessive or unreasonable.⁴⁰

35. See *Mossler v. Nouri*, No. 03-08-00476, 2010 WL 2133940, at *8 (Tex. App.—Austin May 27, 2010, pet. denied) (noting the demand was at least two times what was due); *Wayne*, 52 S.W.3d at 418 (determining charges that were already paid as well as “demanding double holdover rent when that clause had been manifestly waived” constituted unreasonable and excessive demands).

36. In *Bhamani v. Citizens Enterprises*, the Eastland appellate court explained evidence supporting \$30,000 of a demand for approximately \$54,000 meant no showing of an excessive demand had been made. *Bhamani v. Citizens Enters.*, No. 11-13-00041-CV, 2015 WL 1779055, at *8 (Tex. App.—Eastland Apr. 16, 2015, no pet.) (mem. op.).

37. *Findlay*, 611 S.W.2d at 58; see also *Alford v. Johnson*, 224 S.W.3d 291, 299 (Tex. App.—El Paso 2005, pet. denied) (admitting an implied finding when evidence supported the view that the demand was not excessive, but a demand “appreciably greater” than a jury determines to be due can support excessive demand, provided the amount of jury’s award is “not the sole criterion”).

38. See *Oyster Creek Fin. Corp. v. Richwood Invs. II Inc.*, 176 S.W.3d 307, 319 (Tex. App.—Houston 2004, pet. denied) (regarding as unpersuasive the argument that a \$359,000 overcharge was excessive and unreasonable because the “jury was free to disbelieve [the expert’s] opinion of excessive demand”).

39. “[A]bsent some evidence of unreasonableness or bad faith, a demand is not excessive merely because it is greater than that which is later determined at trial to be due.” See *Pennington v. Gurkoff*, 899 S.W.2d 767, 772 (Tex. App.—Fort Worth 1995, writ denied); (explaining the trial court’s reduction of expert’s fee implied that demand was unreasonable and excessive under circumstances despite lack of demonstrated bad faith). see also *Oyster Creek Fin. Corp.*, 176 S.W.3d at 319 n.3 (recognizing the demand might have been found excessive under other circumstances and deferring to jury’s conclusion).

40. See, e.g., *Wayne*, 52 S.W.3d at 418 (Tex. App.—Corpus Christi 2001, pet. denied) (deciding a demand for previously waived holdover rent and for attempting to collect on charges that had already been paid was unreasonable and excessive). Similarly, an Austin appellate court upheld the refusal of attorney’s fees when the claimant conceded during trial the demand was more than she was entitled to collect. *Mossler*, 2010 WL 2133940, at *8; see also *Wallace Roofing, Inc. v. Benson*, No. 03-11-00055-CV, 2013 WL 6459757, at *14 (Tex. App.—Austin, Nov. 27, 2013, pet. denied) (mem. op.) (continuing to assert amounts not owed shows an excessive demand).

B. *An Excessive Demand Claim Requires Showing a Tender of the Amount Owed Was Refused or Would Be Refused*

The other essential element of excessive demand is a refusal by the creditor to accept a tender of the amount owed. It is thus fundamental that the party asserting excessive demand attempt to and be ready and willing to tender the amount actually owed on a debt. However, formal legal tender is not always required if the creditor would certainly refuse the payment.⁴¹ “Application of this rule is limited to situations where the creditor refuses a tender of the amount actually due or indicates clearly to the debtor that such a tender would be refused.”⁴² Tender means to provide an unconditional offer to pay the full amount due or owing on a particular debt.⁴³ To constitute “[a] valid and legal tender of money,” a party must produce the actual funds required to pay the debt.⁴⁴ In determining whether a tender is effective, a court considers whether the amount tendered consisted of the full debt to which the creditor was entitled.⁴⁵ Failure to properly plead and demonstrate the required tender was made will also devastate a claim of excessive demand.⁴⁶ Although, a demonstrated unwillingness to accept the debtor’s payment satisfies this requirement and allows for a successful application of the doctrine.⁴⁷

41. Formal tender is not essential to a claim “where the creditor has clearly indicated the tender of an amount would be rejected.” *Essex Crane Rental Corp. v. Striland Const. Co., Inc.*, 753 S.W.2d 751, 757–58 (Tex. App.—Dallas 1988, writ denied) (citing *Tuthill v. Sw. Pub. Serv. Co.*, 614 S.W.2d 205 (Tex. App.—Amarillo 1981, writ ref’d n.r.e.)).

42. *Hernandez v. Lautensack*, 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied).

43. *Oyster Creek Fin. Corp.*, 176 S.W.3d at 320.

44. *Id.*

45. *Id.*

46. *See Hernandez*, 201 S.W.3d at 777–78 (denying a claim on appeal because there was no evidence of effective tender in the record, undermining the excessive demand defense); *Oyster Creek Fin. Corp.*, 176 S.W.3d at 320 (describing the failure of the appellant to “request a jury issue on his defense of effective tender” caused it to be waived). *But see Findlay v. Cave*, 611 S.W.2d 57, 58 (Tex. 1981) (elaborating on precedent cases in which creditors were unwilling to accept payment of balance actually due).

47. *Cf. Wallace Roofing, Inc. v. Benson*, No. 03-11-00055-CV, 2013 WL 6459757, at *14 (Tex. App.—Austin, Nov. 27, 2013, pet. denied) (mem. op.) (upholding the trial court’s denial of attorney’s fees in case when the party admitted excessive demand and refused tender of the amount due).

IV. EXCESSIVE DEMAND DEFENSE PRECLUDES RECOVERY OF ATTORNEY'S FEES, COSTS AND, NOTABLY, PREJUDGMENT INTEREST

A. *Strong Precedential Support for Denial of Prejudgment Interest Along with Attorney's Fees*

Texas cases uniformly recognize attorney's fees and costs may be prohibited on account of an excessive demand—when properly asserted before the trial court.⁴⁸ However, there is significant long-standing precedent that also supports the denial of prejudgment interest under the defense.⁴⁹ This is not surprising as the same reasoning that justifies withholding attorney's fees from a creditor who prolongs litigation and drives up costs by making an excessive demand underlies the rationale for refusing prejudgment interest.⁵⁰ Still, the fact the excessive demand doctrine precludes recovery of prejudgment interest in addition to attorney's fees is significant. Depending on the length of time litigation endures, “prejudgment interest can equal or even exceed the principal” damages.⁵¹ For cases involving large dollar figure amounts, prejudgment interest can accrue to staggering amounts even when litigation resolves quickly.⁵²

Texas law defines prejudgment interest as “compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.”⁵³ This aspect of damages strives to provide the prevailing plaintiff the ability to recoup the lost value of money owed during the time the defendant had use of the funds which denied plaintiff the opportunity to use or invest it.⁵⁴ In essence, prejudgment interest reimburses the time value of money lost to plaintiff—the assumption being that potential investment value should be paid for the period between plaintiff's injury

48. *Accord Findlay*, 611 S.W.2d at 58 (regarding the long-standing precedential basis for doctrine); *Tuthill v. Sw. Pub. Serv. Co.*, 614 S.W.2d 205, 212 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (commenting that a creditor's excessive demand forecloses a claim for attorney's fees litigating the suit for payment).

49. *See Ingham v. Harrison*, 224 S.W.2d 1019, 1022 (Tex. 1949) (providing the basis for a denial of a claim for prejudgment interest after an excessive demand).

50. *Id.*

51. Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 294 (1996).

52. *Id.* at 295.

53. *Cavnar v. Quality-Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985).

54. *See generally id.* (explaining the purpose of prejudgment interest in terms of the lost time value of money and inability of plaintiff to utilize that sum for investment or interest earning purposes).

and recovery, otherwise the defendant is unjustly enriched.⁵⁵

B. *Settlements Are Encouraged—Delay Tactics Are Discouraged*

Prejudgment interest promotes judicial efficiency. The reason for this is two-fold: (1) by creating incentives for settlement and (2) by deterring delay during litigation.⁵⁶ Because prejudgment interest compensates the plaintiff's loss of the time value of the money owed, the defendant's desire to hold on to the disputed sum is lost.⁵⁷ As the defendant receives no gain from retaining the sums, settlement is encouraged. In theory, plaintiff is put back in the position she was in prior to injury.⁵⁸ The theoretical framework for prejudgment interest is fairness. This principle consideration explains the generally accepted determination that plaintiff should be compensated for present loss (through litigation) and defendant should be penalized.⁵⁹ Prejudgment interest is merely a component of plaintiff's entire loss.⁶⁰ To this extent, prejudgment interest is an impetus for efficient behavior inside and out of litigation.

C. *Implications of Excessive Demands on Adversarial Process*

Thus, generally, when the prevailing party is awarded prejudgment interest as a component of damages, there is no motive to delay or stall the legal process. These settlement-favoring objectives are upended when the party pursuing an excessive demand thwarts the opposing party's ability to efficiently resolve the matter. In such a scenario, the purported injured party is also the party benefitting from prolonged litigation—assuming that results in a greater recovery than the underlying debt alone, which is the case when the debt is supplemented by attorney's fees and prejudgment interest. Inclination to settle and the interplay of time and cost of litigation factor into the decisions of parties to work toward settlement.

55. See Thomas R. Bender, *Does the Right to Trial by Jury Place Constitutional Limits on Prejudgment Interest?*, 39 SUFFOLK U. L. REV. 935, 938 (2006) (expounding on the modern function of prejudgment interest).

56. See *Camar*, 696 S.W.2d at 554 (recognizing prejudgment interest encourages settlement and provides disincentive for stalling litigation); see also Bender, *supra* note 55, at 939 (discussing how prejudgment interest is an impetus for settlement).

57. See Bender, *supra* note 55, at 939 (elaborating on settlement aim of prejudgment interest).

58. *Id.*

59. See Knoll, *supra* note 51, at 295–96 (recounting why fairness supports compensating plaintiff and penalizing defendant).

60. See *id.* at 296 (commenting on the efficiency rationale that “compensation is incomplete without prejudgment interest”). Prejudgment interest is considered a damage component—a type of the oft stated “interest as damages” as opposed to “interest as interest” under Texas law. DORSANEO, *supra* note 3, § 3.03 (describing “included and excluded elements of recovery”).

However, this dynamic is founded upon a functional adversarial system.⁶¹

Excessive demand can be asserted to unwind this perverse result and eliminate an improper motive for delaying litigation or settlement. In *Ingham v. Harrison*, the Texas Supreme Court recognized an excessive demand results in denial of attorney's fees *and* prejudgment interest.⁶² The court noted the demands made were unjust, and the insistence of the respondent on his unjust claims were to blame for failure of payment on the debt.⁶³ "We therefore conclude that interest should not have been allowed to accrue before the date of judgment."⁶⁴ This reasoning is consistent with the purposes of promoting efficient resolution of lawsuits and ensuring fairness between parties.

There is a dearth of recent authority affirming whether excessive demand precludes recovery of prejudgment interest because of the abovementioned recurring issue of parties not properly putting the defense before the trial court. Still, a number of cases demonstrate that some parties are including a denial of prejudgment interest in conjunction with excessive demand claims.⁶⁵ Even more, the preclusive impact of an excessive demand claim on prejudgment interest is recognized by at least one appellate court in Texas.⁶⁶ This view is not unusual considering the running of interest on a claim is typically interrupted by a valid tender.⁶⁷

61. DORSANEO, *supra* note 3, §12.01 (explaining interconnected aspects that drive parties toward settlement and the considerations for doing so).

62. *Ingham v. Harrison*, 224 S.W.2d 1019, 1022 (Tex. 1949).

63. *See id.* at 1022 (contending that refusal of creditor to accept tender undermines claim for prejudgment interest).

64. *Id.*

65. *See Standard Constructors, Inc. v. Chevron Chem. Co.*, 101 S.W.3d 619, 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (arguing for a denial of both attorney's fees and prejudgment interest). The predominant issue is whether the elements are met and not whether the denial of prejudgment interest would be controversial. *See Bhamani v. Citizens Enters., Inc.*, No. 11-13-00041-CV, 2015 WL 1779055, at *8 (Tex. App.—Eastland Apr. 16, 2015, no pet.) (mem. op.) (overruling on appeal an argument to deny recovery of prejudgment interest along with attorney's fees because excessive demand was not proved). Other cases reveal the issue of recoverability of prejudgment interest could be reached had the defense of excessive demand been asserted before the trial court as opposed to before the appellate court for the first time. *See Tuthill v. Sw. Pub. Serv. Co.*, 614 S.W.2d 205, 212 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.) (indicating excessive demand was not properly claimed prior to appeal); *Standard Constructors, Inc.*, 101 S.W.3d at 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (failing to allege excessive demand and obtain jury findings on elements at trial court level).

66. *E.g., Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 419 (Tex. App.—Corpus Christi 2001, pet. denied) (accepting attorney's fees and prejudgment interest recovery are linked). "[W]e have held attorney's fees are barred by the excessive demand doctrine . . . we also hold that an award of prejudgment interest is barred." *Id.*

67. *See Staff Indus. Inc. v. Hallmark Contracting, Inc.*, 846 S.W.2d 542, 549 (Tex. App.—Corpus Christi 2001, no writ) (explaining tender in context of attorney fee entitlement under Texas

Furthermore, linking the recoverability of attorney's fees and prejudgment interest is reasonable based on the policy justifications for each.

V. CONCLUSION

Texas's excessive demand defense can be a powerful defense against recovery and potential deterrent to the proffering of inordinate demands and costly stalling in litigation. The defense must be pleaded and supported by evidence sufficient to put the question before a jury. The recurring lessons yielded from the cases are that failure to raise the defense and meet the elements ruins application of the defense. If a party makes an unreasonable or bad faith demand for a sum the party is not entitled to receive and further refuses or reveals its unwillingness to accept tender of the amount actually owed, excessive demand can vitiate the recovery of potentially substantial attorney's fees and prejudgment interest associated with the lawsuit attempting to recover the debt. Determining whether a demand is excessive and unreasonable is a varied and fact-intensive inquiry. Preventing excessive demands serves the purpose of resolving disputes fairly and efficiently by eliminating improper motives to delay settlement. Knowing the ins and outs of the doctrine enables litigants to either preserve their recovery against diminution on one side or protect against unjust exposure to mounting attorney's fees and damages based on unreasonable, bad faith demands on the other.

Civil Practice and Remedies Code and limits to recovery imposed by the excessive demand doctrine).