CHAPTER 1

THE FOUNDATION

1-1 Legal Bases for Recovering Attorneys' Fees

Before the American Revolution, it was customary for the losing party in a lawsuit to be responsible for paying the prevailing party not only damages, but costs of court and attorneys' fees. The American Revolution changed that practice and led to a revolution in the award of attorneys' fees in litigation. The new "American Rule"—as contrasted with the English Rule—does not provide for the automatic recovery of attorneys' fees to the prevailing party, only "costs" of court. "Costs of court" is a very narrow category that includes such things as transcript costs, filing fees, service of process fees, etc., which does not encompass most general litigation expenses. For more than a century, Texas has followed the "American Rule" and not allowed trial courts the inherent authority to award attorneys' fees absent a contract or statute. *Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 452 n.4 (Tex. 2016); *See Intercontinental Grp. P'ship v. KB Home Loan Star L.P.*, 295 S.W.3d 650 (Tex. 2009).[1] The availability of attorney's fees under a particular statute is a question of law for the court. *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 453 (Tex. App.—Houston [14th Dist.] 2016). When a court does award attorneys' fees based on a statute, they strictly construe the application of the statute since the award of attorneys' fees is penal in nature. *New Amsterdam Cas. Co. v. Tex. Indus., Inc*., 414 S.W.2d 914, 915 (Tex. 1967). Nonetheless, a number of significant statutory exceptions to the Rule have arisen over the years, as well as equitable, rule and contractual bases, that provide for the recovery of attorneys' fees.

1-1 Legal Bases for Recovering Attorneys' Fees

This chapter will address some of the legal bases for your recovery of attorneys' fees in Texas. *First*, contracts between parties may provide for the recovery of attorneys' fees. *Second*, Section 38 of the Civil Practices and Remedies Code permits a broad basis for recovering attorneys' fees in contractual actions even without an explicit right to such recovery in the contract. *Third*, there are a number of statutes that provide for the recovery of attorneys' fees. We will look in depth at the most popular statutes that permit recovery, but we have also included a chart in Appendix 22 of some of the less-common statutes that provide recovery. Of course, if your case applies the law of another state or

[1] *See also Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006); *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999); *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996).

jurisdiction, you need to examine that jurisdiction's common law and statutes for potential substantive bases for the recovery of fees. Finally, there are a few additional bases for attorneys' fees—though very circumscribed—such as class actions or common fund recoveries; situations in which attorneys' fees constitute the actual damages of the case, such as for bad faith litigation; for a motion to dismiss an action for no basis in law or fact; under the Texas Citizens Participation Act and a few others.

1-2 Recovery of Attorneys' Fees by Contract

The right to recover attorneys' fees in Texas is usually found in a statute—the most far-reaching statute being Chapter 38 of the Texas Civil Practice & Remedies Code. Parties, however, are free to contract for the recovery of attorneys' fees either more broadly or loosely than provided by statute. *See Intercontinental Grp. P'ship v. KB Home Loan Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). Two parties who enter into a contract that provides for the payment of attorneys' fees within the terms of the contract are bound to those terms like they are bound to any other contractual obligation. Relying on the broad freedom of contract, the Supreme Court of Texas held that a contract that fails to provide reciprocal rights to attorneys' fees is not per se unconscionable. *See Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 231-33 (Tex. 2014) ("Parties are generally free to contract for attorney's fees as they see fit. Thus, a contract that expressly provides for one party's attorney's fees, but not another's, is not unconscionable per se.") (citing *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009)).

When contracting for the payment of attorneys' fees, it is important for the parties to clearly define the terms of the contract or the court will be left to try and determine the parties' intent, giving terms their "standard" meaning. *See Intercontinental Grp. P'ship v. KB Home Loan Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009) (holding that contract language awarding the "prevailing party" attorneys' fees required an award of damages or other relief in order to be awarded attorneys' fees based on the "standard" meaning of the term, since the contract did not define the term). The contract will indemnify the prevailing party for attorneys' fees incurred in settling the dispute under the contract. *See Graham v. Turcotte*, 628 S.W.2d 182, 183 (Tex. App.—Corpus Christi 1982, no writ). A person may not recover attorneys' fees based on a contractual obligation without showing "privity of contract or some special

relationship, such as a third party beneficiary contract." *Graham v. Turcotte*, 628 S.W.2d 182, 183 (Tex. App.—Corpus Christi 1982).

1-3 Recovery of Attorneys' Fees by Statute

In addition to a potential contractual basis, attorneys' fees are recoverable from an opposing party if authorized by statute. *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002). A statute will only provide for the recovery of attorneys' fees if it states that authority in express terms, and courts may not award attorneys' fees based on implication. *See Tucker v. Thomas*, 419 S.W.3d 292, 293 (Tex. 2013) (holding that absent express statutory authority, the trial court did not have discretion to award attorneys' fees in non-enforcement modification suits by characterizing them as necessaries or as additional child support); *Tedder v. Gardner Aldrich, LLP*, 421 S.W.3d 651, 652 (Tex. 2013) (rejecting argument that one spouse's legal fees in divorce proceeding were "necessaries" within the meaning of the spousal support statute). *See also Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999). A listing of many other statutory bases for the recovery of attorneys' fees in Texas is contained in Appendix 22, but Chapter 38 of the Texas Civil Practice & Remedies Code is the most common statutory vehicle for recovery of attorneys' fees.

1-4 Chapter 38

The statutory language of Chapter 38 provides that "a person may recover reasonable attorneys' fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; and (8) an oral or written contract." Tex. Civ. Prac. & Rem. Code § 38.001. The most common applications of Chapter 38 allow a party to recover attorneys' fees incurred in a successful breach of an oral or written contract, on sworn accounts, and claims for quantum meruit. *See* Tex. Civ. Prac. & Rem. Code §§ 38.001, 38.006; *see also Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000). In contrast to the general American Rule, Chapter 38 provides that its provisions are to be liberally construed by courts in order to promote the underlying purpose of the statute. Tex. Civ. Prac. & Rem. Code § 38.005.

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1-4 Chapter 38

To recover attorneys' fees under Chapter 38, a party must: (1) prevail on the claim for which the attorneys' fees are recoverable; and (2) recover damages.[2] *Mustang Pipeline Co., Inc., v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 201 (Tex. 2004); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). Accordingly, "Section 38.001 does not provide for attorney's fees in the pure defense of a claim." *Brockie v. Webb*, 244 S.W.3d 905, 910 (Tex. App.—Dallas 2008, pet. denied). A court has "discretion to fix the amount of attorneys' fees, but it does not have the discretion to completely deny attorneys' fees if they are proper under section 38.001." *World Help v. Leisure Lifestyles*, 977 S.W.2d 662, 683 (Tex. App.—Fort Worth 1998, pet. denied).

In addition, in order to recover under Chapter 38 a party must follow certain procedural requirements such as: "(1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented." Tex. Civ. Prac. & Rem. Code § 38.002. The procedural requirements of Chapter 38 will be discussed in greater detail in Chapters 2 and 5.

Chapter 38 contains an exception and "does not apply to a contract issued by an insurer that is subject to the provisions of: (1) Title 11, Insurance Code; (2) Chapter 541, Insurance Code; (3) the Unfair Claim Settlement Practices Act (Subchapter A, Chapter 542, Insurance Code); or (4) Subchapter B, Chapter 542, Insurance Code." Tex. Civ. Prac. & Rem. Code § 38.006. This provision does not mean that insurers who are subject to the provisions listed in Section 38.006 are exempt from paying any attorneys' fees in a breach-of-contract action. *See Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 2 (Tex. 2000). The Texas Supreme Court has clarified that this provision means that Section 38.006 only denies attorneys' fees in a breach-of-contract when the insurer is liable for attorneys' fees under another statute. *Grapevine Excavation, Inc.*, 35 S.W.3d at 5. Where another statute does not apply to an insurer, Chapter 38 still "provides that litigants may recover reasonable attorneys' fees incurred in a valid claim based upon a written contract." *Grapevine Excavation, Inc.*, 35 S.W.3d at 2. Parties seeking to recover attorneys' fees against a partnership or other noncorporate entity

[2] As discussed in Section 2-2, courts have interpreted damages to encompass something of value achieved by the litigation, such as specific performance, equitable relief, etc.

should be aware that Section 38.001 may not allow recovery of attorneys' fees incurred in a successful breach of contract claim against a partnership or other entities that are not a corporation. *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 453 (Tex. App.—Houston [14th Dist.] 2016).

By its terms, Section 38.001 authorizes recovery of fees only from "an individual or corporation." Tex. Civ. Prac. & Rem. Code § 38.001. Because the statute does not define these terms, their "plain and common meanings" control. *See* Tex. Gov't Code § 311.011(a) ("words and phrases shall be read in context and construed according to the rules of grammar and common usage"); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). Addressing the scope and application of the statute, some courts of appeals held that Section 38.001 does not allow for the recovery of attorneys' fees against a partnership because a partnership "is neither an individual nor a corporation." *Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 575 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014, pet. denied); *see also Baylor Health Care Sys. v. Nat'l Elevator Indus. Health Benefit Plan*, No. 3:06-CV-1888-P, 2008 WL 2245834, at *6 (N.D. Tex. June 2, 2008) (determining the Texas Supreme Court would find Section 38.001 unambiguous and limit recovery to individuals and corporations); *Hoffman v. L&M Arts*, No. 3:10-CV-0953-D, 2015 WL 1000838, at *7 (N.D. Tex. Mar. 6, 2015), *aff'd* 838 F.3d 568 (5th Cir. 2016) (making *Erie* guess that "individual" under Section 38.001 does not include business entities such as LLCs). Although some courts allowed the recovery of attorneys' fees from partnerships and other noncorporate entities, *see, e.g., Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998); *RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.*, 348 S.W.3d 444, 453 (Tex. App.—Dallas 2011, no pet.), none of those cases specifically addressed the issue of whether such entities qualified as "individual[s]" or "corporation[s]" against whom attorneys' fees may be recovered pursuant to Section 38.001. *See Fleming & Assocs*., 425 S.W.3d at 576 n.17. Although there is no evidence that the legislature intended to create this "entity gap" for recovery of attorneys' fees and the Supreme Court has never addressed this issue, Texas courts of appeal coalesced on the conclusion that parties seeking to recover attorneys' fees from a partnership or noncorporate defendant in the event of a breach need a provision in their written contracts because courts held that the application of plain language of Chapter 38 did not include entities other than "corporations."

In response to these decisions, legislators filed bills in 2015, 2017, and 2019 to amend the language of the statute to clarify that it should include all business organizations. However, each of those bills failed to pass.

As this edition goes to press, however, House Bill 1578 has been passed by the legislature and signed by the governor. This bill amends Section 38.001 of the Civil Practice & Remedies Code to fix the "entity gap." Section 38.001(a) now defines "organization" to have "the meaning assigned by Section 1.002, Business Organizations Code." Section 38.001(b) permits recovery of attorneys' fees from "an individual or organization" so the statute now expressly includes any type of organization as defined under the Business Organizations Code.

There are two qualifications to the legislative fix of the "entity gap." First, there are some limited exceptions. Section 38.001(b) expressly excludes three types of entities from the definition of "organization": "other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust." So certain charitable, religious and quasi-governmental organizations will be exempt from a recovery of attorneys' fees under Chapter 38.

Second, the fix of the "entity gap" is not retroactive. **The revised statute applies only to cases filed on or after September 1, 2021.** Accordingly, cases pending—unless non-suited and re-filed on or after September 1, 2021—will have to look for a basis other than Chapter 38 to recover fees against entities other than corporations or revisit the court of appeals cases discussed above to argue that the older version of Chapter 38.001 should not have been construed so narrowly, an issue that the Supreme Court never examined.

Because the availability of attorney's fees under a particular statute is a question of law—as opposed to the amount to be awarded—the availability of attorneys' fees should be resolved as a legal matter through summary judgment or as a matter of law to be resolved by the Court. *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 453 (Tex. App.—Houston [14th Dist.] 2016).

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1-5 Declaratory Judgment Act

1-5 Declaratory Judgment Act

Besides Chapter 38, there are other common statutes that permit the recovery of attorneys' fees. For example, a declaratory judgment action under Chapter 37 of the Civil Practice & Remedies Code can provide for the recovery of attorneys' fees unless they are "not permitted under the specific common-law or statutory claims involved" in the suit. *MBM Fin. Corp. v. Woodlands Operating Co.*, *L.P.*, 292 S.W.3d 660, 670 (Tex. 2009) (holding that the prevailing party could not recover attorneys' fees under Chapter 37 for declaratory judgment when attorneys' fees would not be awarded under Chapter 38 since at trial they recovered no damages on the breach of contract claim.) Declaratory relief is improper and attorneys' fees are not available where the declarations requested "add nothing to what would be implicit or express in a final judgment for the other remedies sought in the same action." *Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624-25 (Tex. 2011); *TEPCO, L.L.C. v. Reed Exploration, L.P.*, 485 S.W.3d 557, 570 (Tex. App.—Houston [14th Dist.] 2016, no pet.) ("The trial court . . . erred in awarding attorney's fees based on declaratory relief that duplicated issues already before the court, as to which the . . . parties cannot recovery attorney's fees"). The logic for this is undeniable because if repleading a claim as a request for declaratory judgment could justify a fee award, then attorneys' fees would be available for all parties any time fees were at issue. Unlike other statutes that require an award of attorneys' fees to the prevailing party, recovery of attorneys' fees under the Declaratory Judgment Act is in the sound discretion of the trial court, as long as they are not arbitrary, unreasonable, or "without regard to guiding legal principles." *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Also, unlike other statutes, a party need not be the prevailing party to recover attorneys' fees under the Declaratory Judgment Act. *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 512-13 (Tex. App.—Austin 1993, writ denied) (noting that attorneys' fees under the Declaratory Judgment Act are not limited to the prevailing party). Because the Declaratory Judgment Act provides that the court "may" award attorney's fees, the statute affords the trial court a measure of discretion in deciding whether to award attorney's fees or not. *Lance v. Robinson*, 542 S.W.3d 606, 630 (Tex. App.—San Antonio Jan. 13, 2016), *aff'd in relevant part by* 543 S.W.3d 723 (Tex. 2018); *see also Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) ("[T]he award of attorney's fees in declaratory judgment actions is clearly within the trial court's discretion and is not dependent on a

finding that a party 'substantially prevailed.'"). The attorneys' fees awarded in declaratory judgment actions must, however, meet the same requirements of other attorney fees awards, such as that they must be reasonable and necessary, equitable and just, and must be based on factually sufficient supporting evidence. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

1-6 DTPA

Another example of a statute allowing for the recovery of attorneys' fees are claims brought under the Texas Deceptive Trade Practices Act (DTPA) found in Chapter 17 of the Business and Commerce Code, which provides "each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees." *McKinley v. Drozd*, 685 S.W.2d 7, 8 (Tex. 1985) (citing Tex. Bus. & Com. Code § 17.50(d)). In DTPA claims, consumers may recover attorneys' fees based on the successful prosecution of a claim as long as they are awarded actual damages, regardless of whether the claim was entirely offset by a claim of an opposing party and no net recovery is achieved. *McKinley v. Drozd*, 685 S.W.2d 7, 9-10 (Tex. 1985). The reason behind this rule is that the DTPA, like Chapter 38, provides for liberal construction of its own provisions in order to protect consumers and provide economical procedures to ensure that protection. *McKinley v. Drozd*, 685 S.W.2d 7, 9 (Tex. 1985). As with other statutes that allow for the award of attorneys' fees in a DTPA award, the jury must award attorneys' fees in "a specific dollar amount, not as a percentage of the judgment." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 819 (Tex. 1997). If the plaintiff has a contingent-fee agreement, the agreement should be considered but cannot alone support an award of attorneys' fees under the DTPA. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

A DTPA defendant can also recover reasonable and necessary attorneys' fees and court costs, but only if the court finds the suit was: (1) groundless in fact or law; (2) brought in bad faith, or (3) brought for the purpose of harassment. Tex. Bus. & Com. Code § 17.50(c).

Like other statutes awarding attorneys' fees, courts will determine the reasonableness of the fees based on what are known as the *Andersen* factors. *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W.2d 812, 819 (Tex. 1997). The *Andersen* factors will be laid out in more detail in Chapter 2.

The DTPA has a presuit demand requirement that requires notice of a claim at least sixty days before filing suit. Tex. Bus. & Com. Code § 17.505(a). The notice must be in writing and must state the details of the specific complaint, the amount of actual damages, and the amount of expenses including attorneys' fees sought. Tex. Bus. & Com. Code § 17.505(a). Lack of notice must be timely objected to or it is waived. Tex. Bus. & Com. Code § 17.505(c) (objection must be filed within thirty days of original answer). Failure to give notice does not limit damages or require dismissal; the remedy for lack of notice is a sixty-day abatement to allow for settlement. *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992); Tex. Bus. & Com. Code § 17.505(a).

1-7 Other Common Statutes

Other commonly used statutes permit the recovery of attorneys' fees in securities, insurance, intellectual property, antitrust law, and covenant not to compete cases.

- Shareholder derivative litigation (Tex. Bus. Orgs. Code §§ 21.551-.563)
- In connection with the sale or issuance of a security (Tex. Rev. Civ. Stat., art. 581-33)
- Insurers' failure to promptly pay claims (Tex. Ins. Code §§ 542.051-.061)
- Unfair competition and unfair practices in insurance (Tex. Ins. Code §§ 541.001-.454)
- Insurer's unfair claim settlement practices (Tex. Ins. Code §§ 542.001-.014)
- Trademark infringement (Tex. Bus. & Com. §§ 16.101-.107)
- Texas Free Enterprise and Antitrust Act of 1983 (Tex. Bus. & Com. §§ 15.01 et seq.)

- Antitrust cases (Tex. Bus. & Com. § 15.01)

- Enforcement of covenants not to compete (Tex. Bus. & Com. § 15.51)

Additionally, a non-exhaustive list of statutes covering attorneys' fees organized by type of claim is included in Appendix 22.

1-8 Recovering Attorneys' Fees in Class Actions

According to Texas Rules of Civil Procedure, Rule 42 authorizes an award of attorneys' fees in cases that have been certified as class action suits. *See General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 958 (Tex. 1996). Before the trial court can certify a case as a class action, it must determine "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Tex. R. Civ. P. 42(b)(4). One benefit of class actions is that they allow numerous claimants with relatively small claims to obtain relief through a more economic means than a traditional individual lawsuit. *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 952 (Tex. 1996). Class actions help spread the costs of litigation "among numerous litigants with similar claims." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996).

In class action suits where a settlement is reached, the court must approve the settlement and determine that it is "fair, adequate, and reasonable." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996) (citing Tex. R. Civ. P. 42(e)). In order to approve a settlement the court must consider certain factors including: "(1) whether the settlement was negotiated at arms' length or was a product of fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings, including the status of discovery; (4) the factual and legal obstacles that could prevent the plaintiffs from prevailing on the merits; (5) the possible range of recovery and certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representatives, and the absent class members." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 955 (Tex. 1996). Once the court has accepted a settlement, the class must receive adequate notice of all of the material terms of the settlement, including "the maximum amount of attorneys' fees being sought by class counsel and specify the proposed method of calculating the award." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 957 (Tex. 1996).

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1-9 Recovering Attorneys' Fees in Equity: Common Fund Litigation and Attorneys' Fees as Substantive Damages

The court, in awarding attorneys' fees, may do so by one of two means: the "percentage method" or the "lodestar method." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996). When the value of the settlement is subject to a reasonably clear estimation, the court may use the percentage method. *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996). Alternatively, the court may use the lodestar method, "which calculates fees by multiplying the number of hours expanded by an appropriate hourly rate determined by a variety of factors, such as the benefits obtained for the class, the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to acceptance of the class action suit, and the hourly rate customarily charged in the region for similar legal work." *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989). These methodologies will be more fully developed in Chapters 2-4.

1-9 Recovering Attorneys' Fees in Equity: Common Fund Litigation and Attorneys' Fees as Substantive Damages

Despite the American Rule, attorneys' fees can be recovered in two limited circumstances on equitable grounds where there is no contract providing for them and no applicable statute. The first is common fund litigation. Common fund litigation is an action in equity, not in contract, and expenses including attorneys' fees are charged to the common fund. *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 799 (Tex. 1974). Texas courts derived their power to exercise such equitable jurisdiction from federal courts, who "in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require." *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 799 (Tex. 1974). "The rule is founded upon the principle that one who preserves or protects a common fund works for others as well as for himself, and the others so benefited should bear their just share of the expenses, including a reasonable attorney's fee; and that the most equitable way of securing such contribution is to make such expenses a charge on the fund so protected or recovered." *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 799 (Tex. 1974) (citing *Brand v. Denson*, 81 S.W.2d 111 (Tex. Civ. App. 1935, writ dism'd). Put another way, the objective of the common fund doctrine is to distribute any costs of litigation

equally among those who received a common benefit in the litigation so as to not unjustly enrich any member of the common fund at the expense of the plaintiff pursuing litigation. *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 800 (Tex. 1974). In such cases, it is appropriate for the court, in the exercise of equitable jurisdiction, to award attorneys' fees from the common fund. *Knebel v. Capital Nat'l Bank in Austin*, 518 S.W.2d 795, 799 (Tex. 1974).

The second equitable ground sometimes allows for recovery of attorneys' fees as damages where a party incurs them in defending a previous suit based on the wrongful act of another. *See Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838-39 (Tex. App.—Eastland 1984, no writ). In this case, even though the American Rule disfavors the award of attorneys' fees absent a contract or statute, some Texas courts have chosen to follow the federal courts' practice of exercising their equitable power "when the interests of justice so require." *See Lesikar v. Rappeport*, 33 S.W.3d 282, 306 (Tex. App.—Texarkana 2000, pet. denied); *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838 (Tex. App.—Eastland 1984, no writ). The courts that recognize an exception to the American Rule based in equity, have held that when "the wrongful act or contractual violation involves the claimant in litigation with third parties and forces the claimant to incur expenses to protect his interests," those costs and expenses, including attorneys' fees, "are treated as the legal consequence of the original wrongful act and are permitted to be recovered as damages." *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 839 (Tex. App.—Eastland 1984, no writ). It is important to note that the appellate courts do not uniformly acknowledge this exception to the American Rule of only allowing for the recovery of attorneys' fees when mandated by statute or contract, and the Supreme Court of Texas has yet to rule on this issue. *See Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 898 (Tex. App.—Dallas 2003, no pet.). Accordingly, in seeking the recovery of attorneys' based on these grounds, it is important to know if your appellate court has adopted this exception.

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1-10 Recovery of Attorneys' Fees Based on Litigation in Bad Faith and Frivolous or Meritless Lawsuits

1-10 Recovery of Attorneys' Fees Based on Litigation in Bad Faith and Frivolous or Meritless Lawsuits

Texas Rules of Civil Procedure 13 provides for an award of attorneys' fees as a sanction against parties who either abuse the discovery practice or "who signs a pleading, motion, or other paper that is 'groundless and brought in bad faith or groundless and brought for the purpose of harassment.'" *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009) (citing Tex. R. Civ. P. 13); *see also Keith v. Solls*, 256 S.W.3d 912, 916 (Tex. App.—Dallas 2008, no pet.). Generally, there is a presumption that pleadings and other filings are filed in good faith. *Keith v. Solls*, 256 S.W.3d 912, 917 (Tex. App.—Dallas 2008, no pet.). The term "groundless" has been defined as having no basis in law or fact, and is not "warranted by a good faith argument for the extension, modification, or reversal of existing law." *Keith v. Solls*, 256 S.W.3d 912, 916 (Tex. App.—Dallas 2008, no pet.). Bad faith is not met through negligence or poor judgment, but instead requires acting for a "dishonest, discriminatory, or malicious purpose." *Keith v. Solls*, 256 S.W.3d 912, 916 (Tex. App.—Dallas 2008, no pet.). Under Rule 13, in order to determine if sanctions are necessary, the court must hold an evidentiary hearing to determine the motives and credibility of the individual who signed the alleged groundless pleading. *Keith v. Solls*, 256 S.W.3d 912, 917 (Tex. App.—Dallas 2008, no pet.). The intent of the individual may be shown through direct or circumstantial evidence. *Keith v. Solls*, 256 S.W.3d 912, 919 (Tex. App.—Dallas 2008, no pet.). In order to recover attorneys' fees as sanctions they must be based on the opposing parties litigation conduct. *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009).

The amount of attorneys' fees may be increased if opposing counsel has engaged in conduct that has caused the time expended in representing a client to be more than customary. In such an instance, you should present evidence to the jury describing the increased efforts required to respond to opposing counsel's tactics. *See, e.g., Elias v. Mr. Yamaha, Inc.*, 33 S.W.3d 54, 63 (Tex. App.—El Paso 2000, no pet.) ("Although [plaintiff] attempted to put the case on a fast track and handle it at low cost by not taking depositions, the defendant forced him to handle the case at a high cost, especially with regard to attorney time, due to excessive discovery fights and difficulty in obtaining

records related to the transactions."). It is always appropriate in contesting attorneys' fees or proffering attorneys' fees to put on evidence for the court to consider the following issues: (1) whether anyone caused unnecessary hearings; (2) whether anyone created unnecessary discovery; (3) whether there is any unreasonable resistance to discovery; (4) whether opposing counsel failed to accept a reasonable settlement offer; or (5) whether opposing counsel had unnecessary personnel associated with the case, such as sending multiple attorneys to a deposition. Presenting evidence on attorneys' fees will be explained in further detail in Chapters 6-8.

1-11 Motion to Dismiss Under Rule 91a

Texas Rule of Civil Procedure 91a is a relatively new rule, effective March 1, 2013, which provides for the dismissal of causes of action that have no basis in law or fact. It provides: "Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact." Tex. R. Civ. P. 91a.1. The purpose of Rule 91a is to allow courts to quickly dispose of causes of action that have no basis in law or fact on motion and without evidence. *See* Tex. R. Civ. P. 91a cmt. The motion to dismiss must be filed within sixty days after the first pleading containing the challenged allegation is served on the movant and at least twenty-one days before the motion is heard. Tex. R. Civ. P. 91a.3.

The rule requires the court to award costs and attorneys' fees to the prevailing party: "Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court." Tex. R. Civ. P. 91a.7.

Case law also supports a prevailing party under Texas Rule of Civil Procedure 91a recovering appellate attorneys' fees. Texas Rule of Civil Procedure 91a.7 specifies "the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court." Because the words "in the trial court" are placed after the phrase "with the respect to the challenged cause of action" and not

after "attorney fees incurred," the prevailing party is only limited to recovering fees related to the cause of action challenged at the trial court level. *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 188 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). A prevailing party, however, is not limited to the mere recovery of fees incurred in the trial court. *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 188 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). If the judgment of a Rule 91a motion is appealed, the ultimate prevailing party is entitled to appellate fees related to the motion and the causes of action on which the party prevailed. *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 188 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

A party may avoid the consequences of losing a Rule 91a motion by nonsuiting the claims 3 days prior to any hearing. *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 303 (Tex. App.—Houston [14th Dist.] 2016, no pet.). A movant cannot be considered a prevailing party on a Rule 91a motion if the court did not rule on the motion. *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 303 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Under Rule 91a, a claimant may nonsuit his challenged claims at least three days before the hearing date of the motion. *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 303 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Further, a court is prohibited from granting a motion that has been nonsuited before this deadline. *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 303 (Tex. App.—Houston [14th Dist.] 2016, no pet.). This procedure provides a claimant an incentive to nonsuit and avoid mandatory awards of costs and attorneys' fees. *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 303 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Nonsuit or amendments not filed 3 days before the date of the hearing may not be considered. Rule 91a.5(c) expressly prohibits the trial court from considering an amendment not filed as required. Tex. R. Civ. P. 91a.5(C) ("In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b)."); *Thuesen v. Amerisure Ins. Co.*, 487 S.W.3d 291, 300 (Tex. App.—Houston [14th Dist.] 2016, no pet.). Unlike Rule 91a.3, Rule 91a.5 does provide a "noncompliance penalty" for the movant's failure to timely file an amended motion: the trial court cannot consider it. *See* Tex. R. Civ. P. 91a.5(c). Rule 91a.5(c) strips the trial court of authority to consider an amended motion that does not comply with the Rule, and the trial court errs if it fails to properly interpret and apply the Rule.

In re Dep't of Family & Protective Servs., 273 S.W.3d 637, 642 (Tex. 2009). *See also MedFin Manager, LLC v. Stone*, 613 S.W.3d 624, 629-30 (Tex. App.—San Antonio 2020, no pet.).

1-12 Texas Citizens Participation Act Suits

Texas passed the Citizens Participation Act, which became effective on June 17, 2011, commonly referred to as anti-SLAPP legislation (Strategic Litigation Against Public Participation). Tex. Civ. Prac. & Rem. Code §§ 27.001-.011. The anti-SLAPP Statute provides for a motion to dismiss if the lawsuit relates to the exercise of defendant's constitutional rights and the plaintiff cannot establish "clear and specific evidence" of a prima facie case. If the court grants the motion to dismiss, then the defendant shall recover its attorneys' fees. Likewise, if the court finds the motion to dismiss frivolous or intended solely to delay, then the plaintiff shall recover its fees.

In 2019, the Texas legislature amended the TCPA to provide, among other things, an exception to the TCPA's fee-shifting requirement for compulsory counterclaims. Specifically, the amendment provides that a court may award attorneys' fees to the moving party if the court (1) dismisses the nonmoving party's compulsory counterclaim and (2) finds "the counterclaim is frivolous or solely intended for delay." *See* Act of May 17, 2019, 86th Leg., R.S., H.B. 2730 § 8(c). The amendment took effect on September 1, 2019 and only applies to actions filed on or after that date. *Id.* §§ 11-12.

1-13 Recovery of Attorneys' Fees After Settlement Offer

Though its applicability is limited, a party who makes a settlement offer may be able to recover litigation costs, including attorneys' fees, if the opposing party rejected the offer and the judgment rendered was significantly less favorable to the opposing party than the settlement offer. *See* Tex. Civ. Prac. & Rem. Code § 42.004; Tex. R. Civ. P. 167.