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Ralph I. Miller

Angela C. Zambrano

Michelle Hartmann

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ATTORNEYS' FEES

*Ralph I. Miller**
*Angela C. Zambrano***
*Michelle Hartmann****

THIS article is intended to provide an updated summary of the relevant Texas law regarding the recovery of legal fees and expenses in business litigation and to highlight the most significant developments in this area of law during the Survey period.¹ Since our last survey, the Texas Supreme Court has opined generally on the level of specificity required by a Texas court that determines that “costs” pursuant to Texas Rule of Civil Procedure 131 are “otherwise than as provided by law,” but no notable pronouncements involving the recovery of attorneys’ fees in Texas have been handed down from our highest state court.² However, the enactment of Texas Civil Practices and Remedies Code Section 26.003, which requires that fees in class action lawsuits be awarded using the lodestar method and limits the trial court’s ability to enhance the lodestar award, is an important legislative enactment discussed in this year’s review. Additionally, the scope of this article has been expanded to include several fee recovery statutes not addressed in our last survey.

Section one discusses the most common ways to recover legal fees in business litigation cases. Section two analyzes Texas Disciplinary Rule of Professional Conduct 1.04 and case law interpreting the same. Section three addresses recurring issues in the recovery of fees that any litigant practicing business litigation in Texas should understand—pre-petition recovery, segregation of fees, and the recovery of legal assistant and appellate fees. Finally, section four discusses the recovery of litigation costs and expenses.

* Ralph I. Miller is the managing partner of the litigation section of the Dallas office of Weil, Gotshal & Manges LLP. Mr. Miller practices complex commercial litigation and has testified on the subject of attorneys’ fees on several occasions. Mr. Miller graduated from the University of Texas with highest honors in 1972.

** Angela C. Zambrano is an attorney at Weil, Gotshal & Manges LLP in Dallas, Texas. Mrs. Zambrano practices in the commercial litigation section and has been involved in several attorneys’ fees disputes. She graduated magna cum laude from Southern Methodist University in 1997.

*** Michelle Hartmann is an attorney at Weil, Gotshal & Manges LLP in Dallas, Texas. She graduated summa cum laude from Southern Methodist University in 2001. The authors would like to acknowledge the assistance of Elizabeth Clements, Kate Jett, Meagan Martin, Andrew Bradt, Jo Nan Burns, Elandra Pruitt, and Paul J. Williams with this article.

1. The Survey period runs from October 1, 2002 to September 1, 2003. This article is not intended to analyze all Texas statutes that provide for the recovery of attorneys’ fees.

2. *Roberts v. Williamson*, 111 S.W.3d 113, 123-24 (Tex. 2003).

I. BUSINESS LITIGATION STATUTES PROVIDING FOR THE RECOVERY OF ATTORNEYS' FEES

The general rule in Texas is that litigants are not entitled to recover attorneys' fees and expenses from their opponent unless a contractual³ or statutory provision provides otherwise.⁴ As with every general maxim, however, the exceptions appear to often swallow the rule. This first section introduces the statutes most commonly used by litigants to recover legal fees and costs and discusses recent developments (during the Survey Period) affecting these statutes.

In Texas, litigants involved in business litigation most commonly use three statutory vehicles to recover attorneys' fees: (1) Chapter 38 of the Civil Practice and Remedies Code (the "Code") (authorizing fees in breach of contract actions), (2) Chapter 37 of the Code (authorizing fees in declaratory judgment actions), and (3) Chapter 17 of the Code (authorizing fees in actions brought under the Texas Deceptive Trade Practices Act).⁵ Statutes sanctioning the recovery of attorneys' fees in securities, insurance, intellectual property, antitrust law, and covenant not to compete cases also exist under Texas law.⁶ Finally, although the law in this area is unsettled, attorneys' fees can sometimes be recovered on equitable grounds.

A. RECOVERING ATTORNEYS' FEES IN BREACH OF CONTRACT ACTIONS.

Chapter 38 of the Code permits a prevailing party to recover attorneys' fees and costs in a breach of contract case.⁷ To obtain attorneys' fees

3. A contractual provision providing for attorneys' fees "will establish a prima facie case that the stipulated amount is reasonable and recoverable The burden then shifts to the opposing party to plead, prove, and request an issue on an affirmative defense that (1) the contractual amount is unreasonable, and (2) a particular known amount would be reasonable." *O'Kehie v. Harris Leasing Co.*, 80 S.W.3d 316 (Tex. App.—Texarkana 2002, no pet.) (citing *F.R. Hernandez Constr. & Supply Co. v. Nat'l Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979)). The parties can adopt a liberal or more rigorous standard for recovering attorneys' fees within their contract. *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 417-18 (Tex. App.—Corpus Christi 2001, pet. denied).

4. See *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); *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992); *New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967); *Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964); *Mundy v. Knutson Constr. Co.*, 294 S.W.2d 371, 373 (Tex. 1956); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 701 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Simmons v. Harris County*, 917 S.W.2d 376, 377 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *State v. Estate of Brown*, 802 S.W.2d 898 (Tex. App.—San Antonio 1991, no writ).

5. Other claims that a business litigator should consider seeking legal fees in connection with include federal and certain state antitrust, trade regulation, racketeering, intellectual property and covenant not to compete claims. See *infra* notes 77-158. Similarly, although not specifically addressed in this article, attorneys' fees may be awarded as "costs" pursuant to the Texas Commission on Human Rights Act. TEX. LAB. CODE ANN. § 21.259(a) (Vernon Supp. 2002).

6. See discussion, *infra* notes 77-158.

7. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2001). Section 38.000 provides that "a person may recover reasonable attorneys' fees from an individual or corpora-

under Chapter 38, a party must satisfy three requirements: (1) prevail⁸ and recover damages⁹ in its breach of contract action;¹⁰ (2) present evidence of a reasonable fee for the services rendered in connection with the prevailing claim; and (3) satisfy the procedural requirements of Section 38.002 regarding "presentment."¹¹ Provided that a litigant satisfies these requirements, recovery of attorneys' fees under this provision is

tion, 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; or 8) an oral or written contract." TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2001). Chapter 38 does not apply to some contracts issued by insurers. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.006 (Vernon 2001). Also, one cannot recover fees for a breach of warranty claim pursuant to Section 38.001(8). See JHC Ventures, L. P. v. Fast Trucking, Inc., 94 S.W.3d 762, 769 (Tex. App.—San Antonio 2002, no pet.).

8. Traditionally, courts have defined prevailing party as "one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of its original contention." *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (quoting *City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex. App.—Amarillo 1997, no pet.) (citing *Fed. Deposit Ins. Corp. v. Graham*, 882 S.W.2d 890, 900 (Tex. App.—Houston [14th Dist.] 1994, no writ))). However, in a recent case, the Texarkana Court of Appeals noted that this definition was adopted from the Black's Law Dictionary published in 1979 and that the more recent edition, published in 1999, defined prevailing as "a party in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 564 (Tex. App.—Texarkana 2003, pet. filed) (internal citation omitted). The *Flagship Hotel* court examined the case law interpreting the "prevailing party" requirement and adopted the definition in the 1999 edition of Black's Law Dictionary. *Id.* at 565. The court further held that "[i]f multiple parties receive judgment under the cause of action, the party which received judgment on the main issue is the prevailing party." *Id.* Other courts have simply defined the prevailing party as one who is "vindicated by the trial court's judgment." *Polk v. St. Angelo*, No. 03-01-00356-C, 2002 WL 1070550, at *3-4 (Tex. App.—Austin May 31, 2002, pet. denied); *Dear v. City of Irving*, 902 S.W.2d 731, 739 (Tex. App.—Austin 1995, writ denied).

9. See *Mobil Producing Tex. & New Mexico, Inc. v. Cantor*, 93 S.W.3d 916 (Tex. App.—Corpus Christi 2002, no pet.); *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App.—Beaumont 2002, pet. denied). Even if a party "prevails," several courts have held that the statute requires that the party *also* recover damages to obtain legal fees pursuant to Section 38.001. See *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); see also *Kinsey v. Repinecz*, No. 01-02-00022-CV, 2003 WL 21357299, at *2 (Tex. App.—Houston [1st Dist.] June 12, 2003, no pet.); *Law Offices of Windle Turley P.C. v. French*, No. 2-01-080-CV, 2003 WL 253643, at *7 (Tex. App.—Fort Worth Feb. 6, 2003, no pet.) (denying attorneys' fees when no damages or anything of value awarded); *N.T. Dev., Inc. v. Petersen*, 79 S.W.3d 230 (Tex. App.—Fort Worth 2002, pet. denied) *but see* *Ram-Forwarding Inc.*, 29 S.W.3d at 638; *Cisco Enters., Inc. v. Hardeman Family Joint Venture, Ltd.*, No. 03-02-00230-CV-2002 WL 31833724, at *6 (Tex. App.—Austin Dec. 19, 2002, no pet.) ("Determining whether a party is the prevailing or successful party must be based upon success on the merits, and not whether damages were awarded.")

10. A defendant cannot recover fees under Section 38.001 for defeating a breach of contract claim. See *Rainbow Group, Ltd. v. Johnson*, No. 03-00-00559-CV, 2002 WL 1991141, at *12 (Tex. App.—Austin, Aug. 30, 2002, pet. denied). However, the "party seeking attorneys' fees need not obtain net recovery." *Gereb v. Smith-Jaye*, 70 S.W.3d 272 (Tex. App.—San Antonio 2002, no pet.).

11. See TEX. CIV. PRAC. & REMEDIES CODE ANN. §§ 38.001, 38.002 (Vernon 2001); *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624 (Tex. App.—Dallas 1987, writ denied). Section 38.002 provides (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) the payment for the just amount owed must not have been tendered before the expiration of the thirtieth day after the claim is presented.

mandatory.¹² A trial court has discretion to fix the amount of attorneys' fees, but the general rule is that the court does *not* have the discretion to completely deny attorneys' fees if a litigant has satisfied the requirements of Section 38.001.¹³

Importantly, the Texas Supreme Court has extended Section 38.001 to provide for the recovery of attorneys' fees for fraud claims when the fraud arises out of a breach of contract action.¹⁴ Other appellate courts have extended this exception to any "tort" that arises out of a breach of contract.¹⁵

1. Presenting Evidence of a Reasonable Fee

Chapter 38 requires the litigant to "present evidence" regarding the reasonable nature of the fee award sought.¹⁶ However, under Section 38.003 of the Code, "[i]t is *presumed* that the usual and customary attorneys' fees for a claim of the type described in Section 38.001 are reasonable."¹⁷ While this does not mean that the court must award the

12. See *Cale's Clean Scene Carwash, Inc. v. Hubbard*, 76 S.W.3d 784 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *Cotter v. Todd*, No. 04-01-00084-CV, 2002 WL 31253397, at *6 (Tex. App.—San Antonio Oct. 9, 2002, no pet.); Jackson Law Office, P.C. v. Chappell, 37 S.W.3d 15, 23 (Tex. App.—Tyler 2000, pet. denied); *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 683 (Tex. App.—Fort Worth 1998, pet. denied); *Budd v. Gay*, 846 S.W.2d 521, 524 (Tex. App.—Houston [14th Dist.] 1993, no writ).

13. *Lee v. Perez*, 120 S.W.3d 463, 469-70 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *World Help*, 977 S.W.2d at 683. In *Lee*, the Houston (Fourteenth District) Court of Appeals discussed this general rule set forth in *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990), but noted that "[a] recent case by a panel of visiting judges in this court suggests the contrary." *Lee*, 120 S.W.3d at 470 n.27 (citing *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 221 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)). However, it thereafter held that "[a]s the panel did not distinguish (or even mention) *Ragsdale*, and was addressing a question rendered moot by its dismissal of the contract claim, we instead follow the holding of the higher court." *Id.*

14. See *Gill Sav. Ass'n. v. Chair King, Inc.*, 797 S.W.2d 31, 31 (Tex. 1990).

15. *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 288 (Tex. App.—Corpus Christi 1992, writ granted), *aff'd as modified*, *Schindler v. Austwell Farmers Coop.*, 841 S.W.2d 853 (Tex. 1992) (citing *Gill Sav. Ass'n*, 797 S.W.2d at 31); *Wilson v. Ferguson*, 747 S.W.2d 499, 504 (Tex. App.—Tyler 1988, writ denied). This was true in one case when the party seeking fees did not actually prevail on the breach of contract claim. See *Adams v. H&H Meat Prods., Inc.*, 41 S.W.3d 762, 780 (Tex. App.—Corpus Christi 2001, no pet.). In *DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 430-31 (5th Cir. 2003), in the absence of clear direction from the Texas Supreme Court, the Fifth Circuit Court of Appeals was required to make an *Erie* guess regarding whether attorneys' fees were recoverable under an equitable exception for tortious interference with an existing contract. *Id.* ("When the highest state court is silent on an issue we must make an *Erie* guess."). The Fifth Circuit relied heavily on a Beaumont Court of Appeals opinion in holding that attorneys' fees were recoverable: "We hold that *Texas Beef Cattle* is the appropriate Texas precedent to apply in this diversity case . . . [and that the] exception is limited to situations 'where the natural and proximate results and consequences of prior wrongful acts had been to involve a plaintiff . . . in litigation with and against third parties and other parties.'" *Id.* (quoting *Tex. Beef Cattle Co. v. Green*, 883 S.W.2d 415, 430 (Tex. App.—Beaumont 1994), *rev'd on other grounds*, 921 S.W.2d 203 (Tex. 1996)).

16. Notably, Section 38.001 does not require evidence that the attorneys' fees were *necessary* or that the client agreed to pay for them. See *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 606 (Tex. App.—Dallas 1990, no writ); *Prairie Valley Indep. Sch. Dist. v. Sawyer*, 665 S.W.2d 606, 611 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

17. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 2001).

full amount of “usual and customary fees,”¹⁸ at least one court has held that the “usual and customary” fees determined by the court create a ceiling *above* which the court cannot award fees.¹⁹ Notwithstanding this ceiling, the court relied on Section 38.001 to uphold a trial court award of an amount *below* that ceiling.²⁰ Moreover, the presumption in favor of the reasonableness of “usual and customary” fees can be rebutted by competent evidence.²¹

Texas courts can also take judicial notice of the usual and customary attorneys' fees and the contents of the case file without receiving any other evidence in a bench trial or in a jury case in which the amount of attorneys' fees is submitted to the court with the consent of the parties.²² This means that in such circumstances, the court can determine the reasonable amount of attorneys' fees independent of the work described in the case file and the “usual and customary” fees for a similar claim.²³

2. Presentment

Presentment is an often overlooked element necessary to recover attorneys' fees in a breach of contract action.²⁴ Section 38.002 requires a litigant seeking attorneys' fees to “present the claim to the opposing party or to a duly authorized agent of the opposing party.”²⁵ This means that a plaintiff seeking fees under this chapter must both plead²⁶ and prove presentment to recover attorneys' fees claimed.²⁷ Presentment can be made either before or after suit is filed, but presentment must be at least thirty days before judgment.²⁸ Various forms of presentment have been held to

18. *Bethel v. Butler Drilling Co.*, 635 S.W.2d 834, 841 (Tex. App.—Houston [14th Dist] 1982, writ ref'd n.r.e.)

19. *Id.*

20. *Id.*

21. *Id.*

22. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 2001). Of course, absent the agreement of the parties, the party seeking attorneys' fees must present evidence in support of its request. *Tristan v. C.A. Walker, Inc.*, No. 13-01-410-CV, 2003 WL 21212342, at *5 (Tex. App.—Corpus Christi May 27, 2003, pet. denied).

23. *Id.*

24. *See, e.g., Air Park Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd.*, 109 S.W.3d 900, 913 (Tex. App.—Dallas 2003, no pet.).

25. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 2001).

26. *See Llanes v. Davila*, No. 13-02-129-CV, 2003 WL 124833, at *5 (Tex. App.—Corpus Christi Jan. 16, 2003, pet. denied) (holding that “neither the filing of a suit, nor the allegation of a demand in the pleadings can alone constitute presentment of a claim or a demand that the claim be paid” and refusing to consider demand at mediation because lack of record of such alleged presentment).

27. *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 867 (Tex. App.—Fort Worth 2001, pet. denied).

28. *Id.* The pleadings themselves do not constitute a demand. *Id.*; *see also Grace v. Duke*, 54 S.W.3d 338, 344 (Tex. App.—Austin 2001, pet. denied) (“[T]he mere filing of a breach of contract suit does not constitute presentment.”). The rationale behind the presentment requirement is to permit a defendant to pay a claim *before* accruing attorneys' fees. *VingCard*, 59 S.W.3d at 867.

be sufficient.²⁹ It may be informal and even oral,³⁰ but essentially, some form of notice must be given before judgment³¹ unless the parties agree to contractually waive this requirement.³² Importantly, however, an unreasonably excessive demand is improper and will result in the disallowance of fees.³³

B. RECOVERING ATTORNEYS' FEES IN DECLARATORY JUDGMENT ACTIONS

Chapter 37 of the Code permits the recovery of costs and attorneys' fees in declaratory judgment actions.³⁴ Specifically, Section 37.009 autho-

29. *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981) (holding letter and telephone conversation informing sellers of buyers' intentions to go through with sale of property met requirements of presentment); *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (holding that oral request to tender full performance under contract, which was refused, sufficient to establish presentment); *Marifarms Oil & Gas, Inc. v. Westhoff*, 802 S.W.2d 123, 127 (Tex. App.—Fort Worth 1991, no writ) (oral demand during deposition); *De Los Santos v. S.W. Tex. Methodist Hosp.*, 802 S.W.2d 749, 757 (Tex. App.—San Antonio 1990, no writ) (original bill or invoice sent to buyer); *Adams v. Petrade Int'l, Inc.*, 754 S.W.2d 696, 719 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (same); *Richard Gill Co. v. Jackson's Landing Owners Ass'n*, 758 S.W.2d 921, 926-27 (Tex. App.—Corpus Christi 1988, writ denied) (holding demand letter and testimony that demand was made and turned down was sufficient to establish presentment); *Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 470 (Tex. App.—Fort Worth 1987, writ denied) (discussion between attorneys regarding claim); *Plains Ins. Co. v. Evans*, 692 S.W.2d 952, 956-57 (Tex. App.—Fort Worth 1985, no writ) (same); *Tierney v. Lane*, *Gorman, Trubitt & Co.*, 664 S.W.2d 840, 843-44 (Tex. App.—Corpus Christi 1984, no writ) (notation on check paid under protest); *Humble Exploration Co. v. Amcap Petroleum Assocs.*, 658 S.W.2d 860, 863 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (discovery request); *Welch v. Gammage*, 545 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (holding that request for admission and its response in which party admitted refusal to pay a claim sufficient to establish presentment); *Hudson v. Smith*, 391 S.W.2d 441, 451 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (prior lawsuit).

30. See *W. Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 269 (Tex. App.—Austin 2002, no pet.).

31. *VingCard*, 59 S.W.3d at 867; see also *Bethel v. Norman Furniture Co.*, 756 S.W.2d 6, 8 (Tex. App.—Houston [1st Dist.] 1988, no writ) (“When the question of attorney’s fees is submitted to the court, the court may consider the entire case file to determine whether presentment was made.”); *Llanes*, 2003 WL 124833, at *7 (pleading presentment and allegations are not challenged establishes presentment); *Sanchez v. Jary*, 768 S.W.2d 933, 936 (Tex. App.—San Antonio 1989, no writ); *Wallace v. Ramon*, 82 S.W.3d 501 (Tex. App.—San Antonio 2002, no pet.).

32. *Escalante v. Luckie*, 77 S.W.3d 410 (Tex. App.—Eastland 2002, pet. denied).

33. *Id.* Of course, the demand does not have to be for the exact amount the litigant is entitled to recover. See *W. Beach Marina, Ltd.*, 94 S.W.3d at 269. A demand is not necessarily excessive simply because a jury later determines that the litigant is entitled to less money. *Cameron v. Bell*, No. 13-01-767-CV, 2003 WL 253609, at *2 (Tex. App.—Corpus Christi Feb. 6, 2003, no pet.). Further, a party must affirmatively assert the defense of excessive demand in their pleadings and request findings of fact on the essential element of excessive demand. *Id.*

34. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 2001). Of course, the party seeking fees must plead the request for attorneys' fees in connection with the request for declaratory relief. See *Shepard v. Boone*, 99 S.W.3d 263, 266-67 (Tex. App.—Eastland 2003, no pet.). In *Shepard*, the Eastland Court of Appeals found plaintiffs' request, in the prayer of their third amended original petition, for “[r]easonable attorney’s fees” and a “declaration that the Substitute Trustee’s Deed, the Note, the Deed of Trust, the Contract . . . are void” insufficient to allege adequately an entitlement to attorneys' fees under Section 37.009. *Id.*

rizes the trial court, in its discretion, to award "reasonable and necessary" attorneys' fees that are "equitable and just."³⁵ Further, pursuant to Section 37.009, even *non-prevailing* parties are permitted to recover attorneys' fees.³⁶

The trial court has broad discretion to award or deny attorneys' fees under Section 37.009.³⁷ Indeed, absent specific findings of fact, appellate courts in Texas are reluctant to find that a trial court abused its discretion in awarding or declining to award attorneys' fees pursuant to this section.³⁸

Nevertheless, the Code does impose certain limitations on the trial court's discretion.³⁹ First, the fees awarded must be "reasonable and necessary."⁴⁰ Whether the fees are "reasonable and necessary" are fact questions,⁴¹ and a factually insufficient record will not support an award

35. See *Ranger Ins. Co. v. Ward*, 107 S.W.3d 820, 830 (Tex. App.—Texarkana 2003, pet. denied) ("Since overall, the trial court did not err in its interpretation and application of the law, it did not abuse its discretion in awarding attorneys' fees to Landowners."); *Parts Indus. Corp. v. A.V.A. Servs., Inc.*, 104 S.W.3d 671, 685 (Tex. App.—Corpus Christi 2003, no pet.) ("[I]t is the court's discretion whether to award attorney's fees in declaratory judgment actions and [appellant] has not shown the trial court abused its discretion by denying it attorney's fees."); *Dimock v. Kadane*, 100 S.W.3d 602, 608 (Tex. App.—Eastland 2003, pet. denied) ("The trial court did not abuse its discretion in awarding attorney's fees."); see also *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) ("The statute thus affords the trial court a measure of discretion in deciding whether to award attorneys' fees or not."); *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985) ("[T]he grant or denial of attorney's fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused its discretion."); *Justice Bail Bonds v. Samaniego*, 68 S.W.3d 811, 815 (Tex. App.—El Paso 2001, pet. denied); *Hansen v. Academy Corp.*, 961 S.W.2d 329, 333 (Tex. App.—Houston [1st Dist.] 1997, writ denied); *Trien v. Equity Real Estate, Inc.*, No. 08-99-00464-CV, 2001 WL 1383115, at *4 (Tex. App.—El Paso Nov. 8, 2001, no pet.).

36. See, e.g., *Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 816-17 (Tex. App.—Texarkana 2003, pet. denied) ("[T]he trial court is not required to award attorney's fees to the prevailing party in a declaratory judgment action . . . Additionally, a trial court may, in its discretion, award attorney's fees to the non-prevailing party in a declaratory judgment action."); *Black v. City of Killeen*, 78 S.W.3d 686 (Tex. App.—Austin 2002, pet. denied) ("Whether a party prevails is not a determining factor in avoiding attorney's fees."); *Barshop v. Medina County 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.'").

37. *Ranger Ins. Co.*, 107 S.W.3d at 830; *Parts Indus. Corp.*, 104 S.W.3d at 685; *Bocquet*, 972 S.W.2d at 20.

38. *Marion v. Davis*, 106 S.W.3d 860, 868 (Tex. App.—Dallas 2003, pet. denied) ("[Plaintiff] did not request any findings of fact on the attorney's fees issue, and none were filed. Without findings of fact establishing the basis for the trial court's exercise of discretion, we cannot conclude as a matter of law that the court abused its discretion in declining to award attorney's fees.")

39. TEX. CIV. PRAC. REM. CODE ANN. § 37.009.

40. *Id.*

41. *Id.*; *Marion*, 106 S.W.3d at 868 ("Whether the attorney's fees are reasonable and necessary are fact questions."); *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 729 (Tex. App.—Waco 1998, pet. denied). The fact finder can seek guidance on whether fees are "reasonable and necessary" by examining the factors provided by Texas Disciplinary Rule 1.04, discussed in detail below. See *Bocquet*, 972 S.W.2d at 21; *infra* Section II; but see *Schwedler v. Wright*, No. 07-98-0281-CV, 1999 WL 236511, at *7 (Tex. App.—Amarillo

of attorneys' fees.⁴² However, as recently stated by the Fort Worth Court of Appeals, the standard for factual sufficiency is easily met: "[a]n assertion that the evidence is 'insufficient' to support a fact finding means that the evidence supporting the finding is so weak or the evidence to the contrary is so overwhelming that the answer should be set aside and a new trial ordered."⁴³

Second, the recovery of fees must be "equitable and just."⁴⁴ The question of whether an award of fees is "equitable and just" is an issue to be resolved by the court.⁴⁵

Finally, while either party can recover attorneys' fees pursuant to Section 37.009,⁴⁶ fees *cannot* be awarded when the declaratory judgment claim is the mere "mirror image" of another asserted claim.⁴⁷ The Austin Court of Appeals, in *Strayhorn v. Raytheon E-Systems, Inc.*, recently explained that "[i]t is an abuse of discretion to award attorney's fees under [the Declaratory Judgment Act] when the relief sought is no greater than relief that otherwise exists by agreement or statute."⁴⁸ There, a taxpayer who paid sales tax on the purchase of certain overhead items sued the state Comptroller for a refund *and simultaneously* sought declaratory relief and attorneys' fees regarding this alleged unlawful denial of the tax-

Apr. 8, 1999, pet. denied) (no publication) (opining that the *Arthur Andersen* court's use of "should" rather than "must" makes the 1.04 analysis discretionary).

42. *Bocquet*, 972 S.W.2d at 21; *see also* *Sealy v. Guerrero*, No. 08-02-00367-CV, 2003 WL 22516225, at *3 (Tex. App.—El Paso Nov. 6, 2003, no pet.) (reversing award for lack of evidence of reasonable and necessary attorneys' fees in record). Note that, unlike in a breach of contract case, a court may not take judicial notice of attorneys' fees in a declaratory judgment case. *See Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 311-12 (Tex. App.—Texarkana 2003, no pet. h.).

43. *Karen Corp. v. Burlington N. & Santa Fe Ry. Co.*, 107 S.W.3d 118, 126 (Tex. App.—Fort Worth 2003, pet. denied).

44. TEX. CIV. PRAC. REM. CODE ANN. § 37.009 (Vernon 2002).

45. *Marion*, 106 S.W.3d at 868; *see also* *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Bocquet*, 972 S.W.2d at 21 ("Matters of equity are addressed to the trial court's discretion . . . so is the responsibility for just decisions."); *Trien v. Equity Real Estate, Inc.*, No. 08-99-00464-Cv, 2001 WL 1383115, at *4 (Tex. App.—El Paso Nov. 8, 2001, no pet.).

46. Note, only a party asserting a breach of contract can receive fees pursuant to Section 38.001. *See Smith v. Tex. Farmers Ins. Co.*, 82 S.W.3d 580 (Tex. App.—San Antonio 2002, pet. denied).

47. *See Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 746-77 (Tex. App.—Austin 1995, writ denied); *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 638-39 (Tex. App.—Austin 1992, writ denied); *John Chezik Buick Co. v. Friendly Chevrolet Co.*, 749 S.W.2d 591, 594-95 (Tex. App.—Dallas 1988, writ denied). The question often becomes whether the issue is already pending before the court when the request for a declaration is sought—if it is not, fees can be awarded so long as the declaration sought does not closely resemble the plaintiff's claims. *See Hawk v. E.K. Arledge, Inc.*, 107 S.W.3d 79, 84 (Tex. App.—Eastland 2003, pet. denied); *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 273 (Tex. 2002) (denying fees where declaratory relief was merely incidental to title issues); *Brousseau v. Ranzou*, 81 S.W.3d at 381 (Tex. App.—Beaumont 2002, no pet.); *Thomas v. Thomas*, 902 S.W.2d 621, 626 (Tex. App.—Austin 1995, writ denied); *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 752, 730-31 (Tex. App.—Waco 1998, pet. denied); *but see Hanzel v. Herring*, 80 S.W.3d 167 (Tex. App.—Fort Worth 2002, no pet.).

48. *Strayhorn v. Raytheon E-Systems, Inc.*, 101 S.W.3d 558, 571 (Tex. App.—Austin 2003, pet. denied).

payer's refund.⁴⁹ The district court dismissed the plaintiff's claims for declaratory relief and attorneys' fees.⁵⁰

On appeal, this dismissal was upheld pursuant to the well-settled rule in Texas that "[t]here is no basis for declaratory relief when a party is seeking in the same action a different, enforceable remedy, and a judicial declaration would add nothing to what would be implicit or express in a final judgment for the enforceable remedy."⁵¹ Because plaintiff's request for statutory interpretation was "merely another mechanism for asking the court to order the Comptroller to issue a sales tax refund," the plaintiff could not recover fees through a declaratory judgment action.⁵²

C. RECOVERING ATTORNEYS' FEES IN A DECEPTIVE TRADE PRACTICES ACTION

The Texas Deceptive Trade Practices Act (the "DTPA") also permits the recovery of attorneys' fees—indeed, the award of these fees to a prevailing "consumer" is *mandatory* under the DTPA.⁵³ Similarly, the DTPA mandates the recovery of "reasonable and necessary attorneys' fees and costs" to a defendant for an action that is found to be "groundless in fact or law, or brought in bad faith, or brought for purposes of harassment."⁵⁴ Unlike the recovery of attorneys' fees pursuant to Section 38.001 (for breach of contract actions), however, plaintiffs and defendants must demonstrate that the award of fees under the DTPA is not only "reasonable," but also "necessary," as is the case when seeking fees pursuant to Section 37.009 (for declaratory judgment actions).⁵⁵

49. *Id.* at 562.

50. *Id.*

51. *Id.* at 572 (quoting *Universal Printing Co. v. Premier Victorian Homes, Inc.*, 73 S.W.3d 283, 296 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)).

52. *Id.*; *see also Hawk*, 107 S.W.3d at 84 (stating that "[t]he reality in this lawsuit is that it involves the issue of title" and thus "[t]he claim for declaratory relief is 'merely incidental to the title issues' and attorney's fees are not recoverable") (quoting *Dewhurst*, 90 S.W.3d at 289)); *but see Aquaduct, L.L.C. v. McElhenie*, 116 S.W.3d 438, 444-46 (Tex. App.—Houston [14th Dist.] 2003, no pet. h.) (overruling appellant's argument that appellee's counterclaim is a trespass to try title suit in the guise of a request for declaratory relief).

53. TEX. BUS. & COMM. CODE ANN. § 17.50(d) (Vernon 2002). "If a prevailing party recovers damages, attorney's fees for a violation of the DTPA are mandatory." *Cont'l Dredging, Inc. v. DeKaizerd, Inc.*, 120 S.W.3d 380, 396 (Tex. App.—Texarkana 2003, pet. filed).

54. *Gonzales v. Am. Title Co. of Houston*, 104 S.W.3d 588, 599 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (quoting TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon 2002)).

55. *See Busted v. Coldspring Oakhurst Consol. Indep. Sch. Dist.*, No. 07-02-0013-CV, 2002 WL 31549428, at *3 (Tex. App.—Amarillo Nov. 18, 2002, no pet.) ("[U]nlike the provisions of Tex. Bus. & Com. Code § 17.50(d), which requires that attorney's fees must be necessary in a proceeding under the [DTPA], Section 38.001 only requires that the amount of attorney's fees be reasonable without reference to necessity thereof.") (citing *Murrco Agency, Inc.*, 800 S.W.2d at 606 (emphasis added)).

1. *Recovery of Attorneys' Fees by a Consumer*

Since Section 17.50(d) of the DTPA provides that a prevailing consumer *shall* be awarded court costs and reasonable and necessary attorneys' fees, the critical determinations to any award of fees are whether the consumer has "prevailed"⁵⁶ and whether the fees are "reasonable and necessary."⁵⁷

In *Arthur Andersen & Co. v. Perry Equipment Corp.*, the Texas Supreme Court held that attorneys' fees may be "reasonable" as between the client and attorney for purposes of the standard set forth in Rule 104 of the Texas Disciplinary Rules of Professional Conduct, but unreasonable in the context of an award for attorneys' fees under the DTPA.⁵⁸ Recently, in *Allison v. Fire Insurance Exchange*, the Austin Court of Appeals looked to these *Arthur Andersen* factors in finding evidence legally sufficient to support an \$8.9 million fee award under the DTPA.⁵⁹ In *Allison*, insured homeowners brought, *inter alia*, DTPA claims against their insurer relating to the insurer's handling of insurance claims for water damage and mold remediation.⁶⁰ Following a jury trial, in which the jury verdict exceeded \$32 million dollars against Fire Insurance Exchange for its handling of the insured's claims, the insurer appealed.⁶¹

As to the jury's award of \$8.9 million in fees, the defendant insurer argued the evidence was insufficient to support such a large award, in part, because the plaintiffs' attorneys did not submit *any* hourly time

56. TEX. BUS. & COMM. CODE ANN. § 17.50 (Vernon 2002); *see also* Gulf States Utils. Co. v. Low, 79 S.W.3d 561 (Tex. 2002) (denying attorneys' fees for failure to prevail on DTPA claim); *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 199 (Tex. App.—Houston [14th District] 2002, no pet.) (denying attorneys' fees where counter claimant client of a law firm did not prevail on his DTPA claim). The Texas Supreme Court has interpreted the term "prevailed" liberally. *See McKinley v. Drozd*, 685 S.W.2d 7, 9 (Tex. 1985). For example, the supreme court has held that a consumer "prevails" if the consumer has been awarded *any* of the remedies authorized under Section 17.50(b), even if a net recovery was awarded *against* the consumer. *Id.*; *see also Cont'l Dredging*, 120 S.W.3d at 396 ("while only a prevailing party may recover under Section 17.50, net recovery in the overall suit is not required.").

57. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

58. *Id.* For purposes of determining the reasonableness of a fee, the Texas Supreme Court set forth several important factors to consider:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Allison v. Fire Ins. Exch., 98 S.W.3d 227, 262-63 (Tex. App.—Austin 2002, no pet. h.) (citing *Arthur Andersen & Co.*, 945 S.W.2d at 818).

59. *Allison*, 98 S.W.3d at 263.

60. *Id.* at 233.

61. *Id.* at 233.

sheets.⁶² Overruling this point, the court of appeals stated,

[The plaintiffs' expert] testified, based on his experience in complex cases and review of the [case] file, that [plaintiffs'] attorneys spent a great deal of time on [the plaintiffs'] case because of the paper, motions, preparation for seventy depositions, trial preparation, and complex issues involved. He further explained that [plaintiffs'] attorneys did not keep hourly time sheets because they were under a contingent fee contract, not an agreement based on an hourly fee . . . Having heard [plaintiffs' expert's] testimony, the jury awarded fees in a specific dollar amount, as requested in the charge. [Plaintiffs' expert's] coverage of the factors stated in *Arthur Andersen*, including the suggestion that the dollar amount be based on the contingent fee, are sufficient evidence to support the award of attorneys' fees. Accordingly, we overrule [defendant's] tenth issue and hold that there was legally sufficient evidence of reasonable and necessary attorneys' fees.⁶³

This extraordinary fee award—particularly in light of the complete absence of time records—is noteworthy.⁶⁴

The general rule in suits that involve successful *and* unsuccessful DTPA claims, is that an allocation of fees between the successful and unsuccessful claims is required unless there is a substantial overlap among the claims.⁶⁵ This rule was recently addressed by the Austin Court of Appeals, which, in the context of upholding the district court's fee award, stated that "considering the nature of the DTPA, contract, negligence, and defamation claims as well as the various parties and their time involved in the suit, we conclude that appellees' prosecution of the claims necessitated proof of essentially the same facts. *Thus, the district court was correct in not requiring segregation of attorney's fees.*"⁶⁶

2. Recovery of Attorneys' Fees by a Defendant

The DTPA also mandates an award of attorneys' fees to a defendant when the consumer's suit is found to be "groundless in fact or law or brought in bad faith, or brought for the purpose of harassment."⁶⁷

The existence of bad faith, groundlessness, or harassment is determined

62. *Id.* at 263.

63. *Id.* (internal citation omitted). Because the underlying damages award was significantly reduced by the court of appeals, this court ultimately remanded for a determination by the trial court whether the \$8.9 million award of attorneys' fees was still reasonable in light of this reduction.

64. *Id.*; see also *Valley Nissan, Inc. v. Davila*, 133 S.W.3d 702, 714 (Tex. App.—Corpus Christi 2003, no pet.) (stating that "[a]n attorney's testimony concerning the time spent and the attorney's hourly charge is considered reasonably sufficient evidence to support an attorney's fee award" and upholding the jury's award of \$32,000 as "not unreasonable").

65. See *Williamson v. Tucker*, 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.).

66. *Houston Livestock Show & Rodeo, Inc. v. Hamrick*, 125 S.W.3d 555, 555 (Tex. App.—Austin 2003, no pet.) (emphasis added).

67. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon 2002); see also *Gonzales v. Am. Title of Houston*, 104 S.W.3d 588, 599 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

by the court, *not the jury*.⁶⁸ These terms are not expressly defined in the DTPA, but the Texas Supreme Court has applied the definition of Rule 13 of the Texas Rules of Civil Procedure to define “groundless” for purposes of the DTPA as a suit with “no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.”⁶⁹

Specific findings of bad faith, groundlessness, or harassment are necessary. Recently, in *Gonzales v. American Title Co. of Houston*,⁷⁰ the Houston (First District) Court of Appeals determined that the defendant had *not* met its burden of obtaining a prerequisite finding by the trial court that the suit by the borrowers was groundless in fact or law, made in bad faith, or brought for the purposes of harassment and thus fees were not warranted.⁷¹

For a defendant, a well-drafted settlement offer letter provides the best opportunity to either recover attorneys’ fees or limit its liability for the consumer’s attorneys’ fees in the event the consumer is ultimately successful. Under Section 17.5052, if the defendant’s settlement offer turns out to be the same, substantially the same, or more than the amount of damages found by the trier of fact, the consumer’s attorneys’ fees are limited to the amount of reasonable and necessary attorneys’ fees incurred *before* the date and time of the rejected settlement offer.⁷² Furthermore, if the defendant’s settlement offer is made for the full amount requested by the consumer in the notice, but the consumer rejects the offer, the rejection is evidence that the suit was brought for the purpose of harassment, and the defendant may be able to recover its attorneys’ fees from the consumer under Section 17.50(c), even if the case has merit—meaning the cause is *not* “groundless.”⁷³

D. OTHER STATUTES PERMITTING THE RECOVERY OF ATTORNEYS’ FEES

This year’s Survey also includes a discussion of statutes allowing the recovery of attorneys’ fees in securities, insurance, intellectual property, antitrust, and covenant not to compete cases.

68. § 17.50(c); *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989).

69. § 17.50(c). While no case found discusses definitions of “bad faith” and “harassment,” in other contracts, “bad faith” is defined as “indicia of improper motive, such as ill will, spite, malice, reckless disregard, or dishonesty. See *McDuffie v. Blassingame*, 883 S.W.2d 329 (Tex. App.—Amarillo 1994, writ denied); *Holeman v. Landmark Chevrolet Corp.*, 989 S.W.2d 395 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Zak v. Parks*, 729 S.W.2d 875 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Transport Indem. Co. v. Orgain, Bell & Tucker*, 846 S.W.2d 878 (Tex. App.—Beaumont 1993), *writ denied per curiam*, 856 S.W.2d 410 (Tex. 1993). The term “harassment,” is commonly found to mean annoyance, irritation, or disturbance; however, no Texas case found explicitly discusses or adopts this common definition. See BLACK’S LAW DICTIONARY 717 (7th ed. 1990).

70. *Gonzales*, 104 S.W.3d at 599.

71. *Id.*

72. TEX. BUS. & COMM. CODE ANN. § 17.505(h) (Vernon 2002).

73. See *Donwerth*, 775 S.W.2d at 638.

1. Recovering Attorneys' Fees in Shareholder Derivative Litigation

Upon the termination of a shareholder derivative lawsuit, Texas courts are empowered to award "expenses" incurred by one or both of the parties.⁷⁴ The term expenses is expressly defined in the statute to include "the reasonable expenses incurred in the defense of a derivative proceeding, including without limitation: (a) *attorney's fees*; (b) costs in pursuing an investigation of the matter that was the subject of the derivative proceeding; and (c) expenses for which the domestic or foreign corporation or a corporate defendant may be required to indemnify another person."⁷⁵ There is little case law interpreting Article 5.14J. However, the language of the statute and the limited case law that does exist interpreting the same make clear that depending on the evidence either one—or all—of the parties can collect attorneys' fees in a derivative action.

a. Recovery of Attorneys' Fees by a Derivative Plaintiff in a Derivative Action

Article 5.14J(1)(a) allows a trial court, in its discretion, to award a prevailing plaintiff legal fees if the proceeding results in a "substantial benefit" to the corporation.⁷⁶ Further, a plaintiff may also recover fees from a corporation under Article 5.14J(1)(c) for specific improper filings by the corporation.⁷⁷

b. Recovery of Attorneys' Fees by a Corporation in a Derivative Action

Article 5.14J(1)(b) allows a Texas court to, in its discretion, require the plaintiff to pay these expenses if the court finds that the derivative proceeding was "commenced or maintained without reasonable cause or for

74. Article 5.14J of the Texas Business Corporation Act provides that the court may order:

(a) the domestic or foreign corporation to pay the expenses of the plaintiff incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the domestic or foreign corporation; (b) the plaintiff to pay the expenses of the domestic or foreign corporation or any defendant incurred in investigating and defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or (c) a party to pay the expenses incurred by another party (including the domestic or foreign corporation) because of the filing of a pleading, motion, or other paper, if it finds that the pleading, motion, or other paper (i) was not well grounded in fact after reasonable inquiry, (ii) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (iii) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

TEX. BUS. CORP. ACT art. 5.14 § J (Vernon 2002).

75. *Id.* (emphasis added).

76. See TEX. BUS. CORP. ACT art. 5.14 § J(1)(a); *Rowe v. Rowe*, 887 S.W.2d 191, 198 (Tex. App.—Fort Worth 1994, writ denied) ("Attorney's fees are only recoverable by a successful plaintiff in a shareholder's derivative suit."); see also *Bayoud v. Bayoud*, 797 S.W.2d 304, 315 (Tex. App.—Dallas 1990, writ denied).

77. TEX. BUS. CORP. ACT art. 5.14 § J(1)(c).

an improper purpose.”⁷⁸

The phrase “without reasonable cause” is not defined in the statute. In *Bass v. Walker*, the Houston (Fourteenth District) Court of Appeals analyzed the meaning of this phrase in upholding the trial court’s award of attorneys’ fees to a closely held corporation.⁷⁹ There, plaintiffs brought a derivative action on behalf of Ellington Dirt, a closely held corporation formed for the purpose of acquiring land and leasing this land to another closely held corporation, defendant Walker Sand, Inc.⁸⁰ Ellington Dirt and Walker Sand, Inc. shared a common president and principal shareholder at all relevant times.⁸¹ As alleged in plaintiffs’ original petition, defendants (Walker Sand, Inc. and its president) made use of the relevant land for their own financial gain and subjected the owner of the land (Ellington Dirt) to increased liability due to unauthorized dumping of possible hazardous waste on the property.⁸² The plaintiffs later amended their petition to include a breach of contract claim against Walker Sand and certain other defendants for their alleged breach of the original lease contract.⁸³

On the second day of trial, the plaintiffs settled their claim for the alleged breach of the original lease for \$150,000—all of which went to Ellington Dirt.⁸⁴ Before the remaining claims were sent to the jury, the court granted a directed verdict in favor of the remaining defendants on all but one claim, and the jury thereafter returned a verdict in favor of defendants on this remaining claim.⁸⁵ Thus, other than the settled claim, defendants ultimately prevailed on all claims.⁸⁶

After trial, pursuant to Article 5.14F, the trial court awarded fees in the amount of \$411,499.00 to Ellington Dirt.⁸⁷ The court of appeals upheld this award and the trial court’s finding that the plaintiffs brought the derivative action “without reasonable cause.”⁸⁸ In so doing, it rejected plaintiffs’ contention that the determination whether an action is brought

78. See TEX. BUS. CORP. ACT art. 5.14J(1)(b). The previous version of Article 5.14 was somewhat ambiguous with respect to whether the court or the jury should ultimately decide whether the proceeding was brought without reasonable cause. *Econ. Gas, Inc. v. Burke*, No. 14-93-01016-CV, 1996 WL 220903, at *11 (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (concurring and dissenting opinion) (“[T]he statute, by its plain and unambiguous terms, allows ‘a finding’ of reasonable cause to be made by the court or jury.”) However, the 1997 amendments to the statute make clear that the *court*, not the jury, is to make such determination. See *Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at * 3-6 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet.) (holding determination to be made by court).

79. *Bass v. Walker*, 99 S.W.3d 877 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

80. *Id.* at 880.

81. *Id.*

82. *Id.* at 881.

83. *Id.*

84. *Id.* at 881-82.

85. *Id.* at 882.

86. *Id.*

87. *Id.* at 882.

88. *Id.*

“without reasonable cause” for purposes of Article 5.14F is a subjective inquiry, stating instead that,

[A]fter considering the language of Article 5.14F and the legal standards under other similar statutes, *we adopt an objective standard* and hold that a plaintiff acts without reasonable cause under Article 5.14F if, at the time he brings suit: (1) plaintiff's claims in the lawsuit are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or (2) plaintiff's allegations in the suit are not well grounded in fact after reasonable inquiry.⁸⁹

Under this objective standard, the court of appeals found legally and factually sufficient evidence to support the trial court's finding that the plaintiffs brought the derivative action without reasonable cause.⁹⁰ Significant for the purposes of this finding was the fact that the only claim with apparent merit—the claim that the original lease had been breached by Walker Sand and certain other defendants—was *not* included in the original complaint.⁹¹ Rather, the original claims related solely to allegations of illegal dumping and “significant environmental liability,” and since, as to these allegations, the plaintiffs had not tested or properly evaluated the potential environmental liability, the finding of no reasonable cause was upheld as proper.⁹² The court continued,

The settlement . . . is not material to whether the [plaintiffs] had reasonable cause to bring suit against . . . because that settlement involved different defendants and occurred after the [plaintiffs] brought suit. Though the [plaintiffs] took some steps before suit to investigate the dumping, this investigation showed only that materials . . . had been dumped, not that this material was hazardous or toxic or was likely to give rise to environmental liability. Likewise, though the [plaintiffs'] conversations with [defendants] and their statements at two meetings of shareholders show their concern that there might be some risk of environmental liability because of the dumping of . . . materials, these conversations are not strong evidence of a reasonable prefiling inquiry concerning the nature and extent, if any, of that liability.⁹³

Thus, for purposes of assessing whether a derivative suit is brought without reasonable cause, the court looks *objectively* at the evidence available to a derivative plaintiff *before* the original petition is filed.⁹⁴

Additionally, the corporation—like the derivative plaintiff in the case of the corporation's filings—can recover fees from the derivative plaintiff under Article 5.14J(1)(c) for specific improper filings by the derivative

89. *Id.* at 885 (emphasis added).

90. *Id.*

91. *Id.* at 885-86.

92. *Id.* at 886.

93. *Id.* at 887-88.

94. *Id.*

plaintiff.⁹⁵ Thus, the statute appears to grant the corporation the right to test all of the pleadings, motions, and other papers filed by the derivative plaintiff to determine if any such filing: (1) was not well grounded in fact after reasonable inquiry; (2) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or (3) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.⁹⁶

2. *Receiving Attorneys' Fees in Connection with the Sale or Issuance of a Security*

a. Article 581-33

Article 581-33(A)(2) of the Texas Securities Act ("TSA") creates liability for sellers of securities under certain circumstances.⁹⁷ Similarly, a buyer is liable to the seller under Article 581-33(B) of the TSA when he buys securities "by means of an untrue statement of a material fact or omission to state a material fact,"⁹⁸ and pursuant to both sections of Article 581-33, the injured party *may* be awarded court costs and reasonable *and necessary* attorneys' fees to the extent the court considers such award "equitable."⁹⁹

Recently, in *Citizens Insurance Co. of America v. Hakim Daccach*, the Austin Court of Appeals addressed what circumstances constitute "equitable" circumstances for purposes of awarding fees under the TSA.¹⁰⁰ The trial court certified a class of non-resident insureds who were sold life insurance policies from within the state by an unregistered dealer of securities.¹⁰¹ In opposing this certification to the court of appeals, the defendants noted that the commentary to the TSA recommends that a court consider individual circumstances—such as the conduct of the parties in making the transaction, the conduct of both parties in the lawsuit, whether the defendant benefited from the violation, and fiduciary relationships—when adjudicating equitable circumstances warranting the award of fees under the TSA and that consideration of these issues could result in individual issues predominating over common issues if the plaintiff class was ultimately successful.¹⁰²

95. Article 5.14J(1)(c).

96. Article 5.14J(1)(c).

97. In relevant part, article 581-33(A)(2) states,

[A] person who offers or sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or equity for rescission, or for damages if the buyer no longer owns the security.

98. TEX. REV. CIV. STAT. art. 581-33(B) (Vernon 2003).

99. *Id.* art. 581-33(D)(7).

100. *Citizens Ins. Co. of Am. v. Hakim Daccach*, 105 S.W.3d 712, 726 (Tex. App.—Austin 2003, pet. filed).

101. *Id.* at 725.

102. *Id.*

The court of appeals rejected the defendants' argument, stating that the defendants focused "too literally on the commentary" to the TSA, which the court described as "being only persuasive."¹⁰³ The court recognized that "circumstances" which might make the recovery of attorneys' fees "equitable" for purposes of the TSA "could involve individualized issues of misrepresentation, reliance, or the subjective knowledge of the policy holders,"¹⁰⁴ but held that "here, because the heart of the dispute turns on whether the jury decides that the [insurance] policies constitute securities and whether they were sold from Texas, 'the conduct of each party to each of the underlying transactions' appears *altogether irrelevant*."¹⁰⁵

Finally, the court noted that "the jury will not be presented with an 'overwhelming task' because the court rather than the jury will consider the circumstances that would make recovery of attorneys' fees equitable."¹⁰⁶ This case thus reaffirms the rule that the court, not the jury, determines whether a fee recovery is "equitable" for purposes of awarding attorneys' fees under the TSA, and also sheds light on the fact-specific nature of the inquiry required to determine what circumstances would make a fee recovery equitable.

b. Article 581-33-1

The TSA also creates liability for the activities of investment advisors and their representatives.¹⁰⁷ Under Article 581-33-1, investment advisors who engage in fraud, or fraudulent practices in rendering their services are liable to the purchaser for damages including, "to the extent the court considers equitable, court costs and reasonable attorneys' fees."¹⁰⁸ While no case found interprets this provision, it stands to reason that, since the language of Article 581-33-1 is *virtually identical* to the language of Article 581-33, the above-referenced cases are highly persuasive regarding what constitutes "equitable" circumstances and "reasonable and necessary" fees.

3. Recovering Fees in Insurance-Related Cases

There are three widely-utilized statutes providing for the award of attorneys' fees to insured parties when an insurer is found to have engaged in certain prohibited acts.¹⁰⁹

103. *Id.*

104. *Id.* at 726.

105. *Id.* (emphasis added).

106. *Id.* at 726.

107. TEX. REV. CIV. STAT. art. 581-33-1 (Vernon 2002).

108. *Id.*

109. TEX. INS. CODE ANN. art. 21.21, 21.55 & 21.21-2. Recovery of attorneys' fees may also be allowed to an insured or insurer for breach of the insurance contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001. In Texas, an insurance agreement constitutes a "written contract." See *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 667 (Tex. 1987). Section 38.006 provides that, "[t]his chapter does not apply to a contract issued by an insurer that is subject to the provisions of . . . (4) Article 21.21, Insurance Code, or (5) The Unfair Claim Settlement Practices Act (Article 21.21-2, Insurance Code)." TEX. CIV. PRAC. &

a. Recovering Attorneys' Fees For An Insurers' Failure to Promptly Pay Claims

Article 21.55 of the Texas Insurance Code establishes procedures for the prompt payment of insurance claims and creates a private right of action for an insured against an insurer that fails to promptly respond to and pay for claims by insured parties.¹¹⁰ The damages recoverable by an insured pursuant to Article 21.55 include a discretionary award of "reasonable attorneys' fees."¹¹¹

For an insurer to be liable under Article 21.55 for failing to respond to or pay a claim promptly, the insured party must establish three elements: (1) a claim under the insurance policy, (2) the insurer is liable for the claim, and (3) the insurer has failed to follow one or more sections of Article 21.55 with respect to the claim.¹¹² While Texas courts have held that Article 21.55 should be construed broadly, so as to provide the maximum protection for the insured party,¹¹³ no recovery is allowed without a clear finding that coverage under the underlying policy exists and the insurer is liable on the relevant claim.¹¹⁴ Further, the statute defines the term "claim" narrowly as "a first party claim made by an insured or a policyholder under an insurance policy . . . that must be paid by the insurer directly to the insured or beneficiary."¹¹⁵ Thus, at least explicitly, third party claims—for instance, claims made against an insurer for indemnity against a third party—may *not* be subject to Article 21.55 coverage.¹¹⁶

If an insurer delays payment of a claim within the statutory time period (or, indeed, *even if the insurer wrongfully rejects a claim*), the insurer may

REM. CODE ANN. § 38.006 (Vernon 2002). However, on certification from the United States Court of Appeals for the Fifth Circuit, the Texas Supreme Court recently clarified that courts should follow "established and longstanding Texas authority that interprets Section 38.006 to allow recovery of attorney's fees in successful breach-of-contract action against an insurer unless attorney's fees are otherwise available." *Grapevine Excavation, Inc. v. Maryland Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000).

110. TEX. INS. CODE ANN. art. 21.55 (Vernon 2002).

111. *Id.*

112. *See, e.g., Royal Maccabees Life Ins. Co. v. James*, —S.W.3d —, No. 05-01-01372-CV, 2003 WL 1848601, at *6 (Tex. App.—Dallas Apr. 10, 2003, no pet.) (setting for the three elements and overruling claim for attorneys' fees where the insurer was found *not* to be liable).

113. *See DeLeon v. Lloyd's London, Certain Underwriters*, 259 F.3d 344, 354 (5th Cir. 2001).

114. *See Evergreen Nat'l Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 678-79 (Tex. App.—Austin 2003, no pet.).

115. TEX. INS. CODE ANN. article 21.55, § 1.

116. *But see Ernest Martin, Jr., Article 21.21 and Other Statutory Claims: Staying on Top of New Devs.*, (Mar. 30, 2001), available at <http://www.haynesandboone.com>. Mr. Martin argues that some claims of an insured party under a commercial general liability policy are actually first party claims that should be covered under article 21.21. As stated, this view has case support. *See, e.g., Luxury Living, Inc. v. Mid-Continent Cas. Co.*, No. H-02-3166, 2003 WL 22116202, at *19-21 (S.D. Tex. Sept. 10, 2003, no pet.) ("Mid-Continent has a duty to defend Luxury and to reimburse Luxury for its reasonable defense costs to date in the underlying lawsuit, including statutory penalty under article 21.55 of the Texas Insurance Code, along with reasonable attorneys fees in this action.")

be liable for statutory damages, including attorneys' fees.¹¹⁷ *Farmers Insurance Exchange v. Neal*, demonstrates how fraught with peril wrongfully rejecting a claim, even in apparent good faith, can be in the wake of Article 21.55.¹¹⁸ There, a homeowner brought suit against his insurer after the insurer denied coverage for two race cars destroyed in a home fire.¹¹⁹ The insurer argued that the cars were expressly excluded (under the motor vehicle exclusion) from the homeowner's policy and that, in any event, the homeowner had not given the insurer notice that these cars were kept in the homeowner's garage; the insured homeowner argued the vehicles fell within the "recreation" exception to the motor vehicle exclusion.¹²⁰ The trial court agreed with the insured and ordered the insurer to pay \$41,854.40 as a penalty of non-compliance with Article 21.55 and \$14,004.26 in attorneys' fees.¹²¹

While noting the "*unfortunate position*" of the insurer, the Texarkana Court of Appeals affirmed, stating,

Although reasonable minds may differ in their view of what constitutes a recreational activity or, more specifically, what is encompassed in the phrase "vehicles used for recreational purposes," it is Farmers' unfortunate position to have state-approved or state-promulgated forms to use in its homeowners policies that employ that rather elastic language . . . courts must also adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent.¹²²

b. Recovering Attorneys' Fees For An Insurer's Unfair Competition and Unfair Practices

Article 21.21 of the Texas Insurance Code provides for an insured to recover his or her "reasonable and necessary" attorneys' fees, in the discretion of the trial court, if the insurer is found to have engaged in unfair competition and practices, including misleading advertising, unfair settlement of the insured party's claims, or misrepresenting the contents of an insurance policy.¹²³ Several factors are relevant to the determination whether the award of attorneys' fees pursuant to Article 21.21 are reason-

117. *E & R Rubalcava Constr., Inc. v. Burlington Ins. Co.*, 148 F. Supp. 2d 746, 750 (N.D. Tex. 2001) (holding that insured party is entitled to attorneys' fees award from insurer under article 21.55) (citing *Teate v. Mut. Life Ins. Co.*, 965 F. Supp. 891 (E.D. Tex. 1997)). An insurer's wrongful rejection of a claim may be also considered a delay in payment for the purposes of article 21.55. *Id.*; see also *Nat'l Am. Ins. Co. v. Columbia Packing Co.*, No. 3-02-CV-0909-BD, 2003 WL 21516586, at *7 (N.D. Tex. Apr. 7, 2003) ("The wrongful rejection of a claim, even if made in good faith, may be considered a delay . . .").

118. *Farmers Ins. Exch. v. Neal*, 120 S.W.3d 493, 494 (Tex. App.—Texarkana 2003, no pet.).

119. *Id.* at 493.

120. *Id.* at 494-95.

121. *Id.* at 494 n.1.

122. *Id.* at 497 (internal quotation and citation omitted and emphasis added).

123. In relevant part, Article 21.21 provides,

able and necessary, one of the most important of which is the amount of damages ultimately awarded.¹²⁴

In *Northwinds Abatement Inc. v. Employers Insurance*, the Fifth Circuit discussed how to calculate “reasonable and necessary” attorneys’ fees when the insured party has entered into a contingency fee arrangement with his attorney.¹²⁵ The court held that when counsel and client have entered into a contingency fee arrangement, Texas law requires the *finder of fact* to calculate an award of reasonable and necessary attorneys’ fees as a dollar amount rather than as a percentage of recovery.¹²⁶ In so doing, it borrowed the Texas Supreme Court’s interpretation of a fee-shifting provision of the DTPA for use in the Article 21.21 context, stating that “[t]here is no reason why the Insurance Code’s fee-shifting provision should be treated differently.”¹²⁷

c. Recovery of Attorneys’ Fees For An Insurer’s Unfair Claim Settlement Practices

Article 21.21-2 of the Texas Insurance Code now provides for the recovery of attorneys’ fees by an insured if his or her insurer is found to have engaged in unfair claim settlement practices, such as knowingly making misrepresentations to claimants, failing to investigate claims properly, or failing to settle certain claims properly.¹²⁸ As noted by the Texas Supreme Court in *Rocor International, Inc. v. National Union Fire Insurance Co.*, “Article 21.21 now expressly incorporates the unfair settlement practice defined in Article 21.21-2,”¹²⁹ and establishes liability if the insured shows (1) the policy covers the claim, (2) the insured’s liability is reasonably clear, and (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand’s terms are such that an

[A]ny person who has sustained actual damages caused by another’s engaging in an act or practice declared . . . to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance, may maintain an action . . . and may recover . . . the amount of actual damages plus court costs and reasonable and necessary *attorneys’ fees*.

TEX. INS. CODE ANN. art. 21.21, § 16 (emphasis added).

124. See, e.g., *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 262 (Tex. App.—Austin 2002, no pet. h.) (remanding for a specific determination whether the attorneys’ fees awarded were reasonable); *Gill Sav. Ass’n v. Int’l Supply Co.*, 759 S.W.2d 697, 703-04 (Tex. App.—Dallas 1988, writ denied) (detailing twelve factors normally used in determining reasonableness of an award of attorneys’ fees).

125. *Northwinds Abatements, Inc. v. Employers Ins.*, 258 F.3d 345, 353 (5th Cir. 2001).

126. *Id.* at 354. The court then considered the complexity of the litigation and awarded attorneys’ fees of \$712,000 to the insured party, which was more than nine times the actual damage award. *Id.* at 354-55.

127. *Id.* (“In situations where counsel and client have entered into a contingency fee arrangement, Texas law required the finder of fact to calculate a statutorily-founded award of reasonable and necessary attorneys’ fees as a dollar amount rather than a percentage of the overall recovery.”) (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)).

128. TEX. INS. CODE ANN. art. 21.21-2.

129. *Rocor Int’l, Inc. v. Nat’l Union Fire Ins. Co.*, 77 S.W.3d 253, 268 (Tex. 2002) (finding no violation of Article 21.21 because the injured third party never made a proper settlement demand within the policy limits).

ordinarily prudent insurer would accept it.¹³⁰ Further, "although Article 21.21-2 does not itself create a private cause of action," the Texas Supreme Court has held "that conduct violating Article 21.21-2 [i]s actionable under Article 21.21."¹³¹

4. Recovering Fees in Intellectual Property Cases

Chapter 16 of the Code provides for the recovery of attorneys' fees in certain trademark infringement matters.¹³² Section 16.25 allows a person who believes he or she will be damaged by the registration of a trademark to bring suit to cancel such registration.¹³³ If the court decides that the losing party in a case arising under this section "should have known his position was without merit, the court *may* award the successful party his reasonable attorneys' fees and charge them as a part of the costs against the losing party."¹³⁴

Similarly, Section 16.28 of the Code allows a Texas court to, in its discretion, award attorneys' fees when a party is found to have knowingly made a fraudulent representation when applying for a trademark¹³⁵ or procured an application or registration by false or fraudulent means.¹³⁶

5. Recovering Attorneys' Fees in Antitrust Cases

The Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA") provides for the recovery of attorneys' fees to "[a]ny person or governmental entity" whose "business or property has been injured by reason of any conduct declared unlawful under the TFEAA."¹³⁷

130. *Id.* at 255.

131. *Id.* at 259.

132. As set forth below, Texas law provides for the recovery of attorney's fees in certain trademark related cases. Reasonable attorney's fees are also recoverable in trade secrets cases when the claim arises as a breach of contract, subject to all of the limitations described in Section 38.001. See *Murrco Agency, Inc.*, 800 S.W.2d at 606.

133. TEX. BUS. & COM. CODE ANN. § 16.25(a) (Vernon 2002).

134. *Id.* § 16.25(d) (emphasis added).

135. *Id.* § 16.28(a).

136. *Id.* § 16.28(b)(1). Federal law also provides for the recovery of attorneys' fees in certain intellectual property matters. For example, the federal trademark statute permits a court to award reasonable attorneys' fees to the prevailing party in "exceptional cases." See Trademark Law Revision Act of 1988, 15 U.S.C.A. § 1117(a) (1998); *Martin's Herend Imports, Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1305 (5th Cir. 1997); *Pebble Beach Co. v. Tour 18 I, Ltd.*, 155 F.3d 526, 555 (5th Cir. 1998). Similarly, the federal patent statute provides for the award attorneys' fees to the prevailing party in "exceptional cases." 35 U.S.C.A. § 285 (1994); *Arbrook, Inc. v. Am. Hosp. Supply Corp.*, 645 F.2d 273, 278-79 (5th Cir. 1981). ("The purpose of § 285 is to prevent gross injustice, and an award under that statute requires an unambiguous showing of extraordinary misconduct.")

137. In relevant part, Section 15.21(a)(1) of the TFEAA provides:

Any person or governmental entity, including the State of Texas and any of its political subdivisions or tax-supported institutions, whose business or property has been injured by reason of any conduct declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of this Act may sue any person, other than a municipal corporation, . . . and shall recover actual damages sustained, interest on actual damages . . . and the cost of suit, including a reasonable attorney's fee; provided, however, that if the trier of fact finds

The award of "costs of suit, including reasonable attorney's fees" is mandatory under the TFEAA, but a prerequisite to this recovery is an award of *actual damages* under the statute.¹³⁸ However, the TFEAA expressly provides for the award of attorneys' fees in favor of a party who substantially prevails on the merits of his or her suit for *injunctive relief* under the TFEAA.¹³⁹

Importantly, Section 15.21(a)(2) precludes a party from recovering damages under the TFEAA when a judgment has been obtained under *federal* antitrust law and the state TFEAA action is based upon substantially the same conduct which was the subject of the federal suit.¹⁴⁰

The TFEAA also provides for the mandatory award of "reasonable attorney's fees, courts costs and other reasonable expenses of litigation" if an action is found by the court to be groundless, brought in bad faith, or brought for the purpose of harassment.¹⁴¹

6. Recovering Attorneys' Fees to Enforce Covenants Not to Compete

Chapter 15 of the Code additionally permits, in the discretion of the trial court, the recovery of attorneys' fees incurred by an *employer* in defending an action to enforce a covenant not to compete,¹⁴² and permits,

that the unlawful conduct was willful or flagrant, it shall increase the recovery to threefold the damages sustained and the cost of suit, including a reasonable attorney's fee

TEX. BUS. & COM. CODE ANN. § 15.21(a)(1). Federal antitrust laws, including the Sherman Act, Clayton Act or the Robinson-Patman Act, also provide for the award of attorneys' fees. See 15 U.S.C.A. § 15.

138. See *Chapman Air Conditioning, Inc. v. Franks*, 732 S.W.2d 737, 743 (Tex. App.—Dallas 1987, no writ); *Perritt Co. v. Mitchell*, 663 S.W.2d 696, 699 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

139. In relevant part, Section 15.21(b) of the TFEAA provides, Any person or governmental entity, including the State of Texas and any of its political subdivisions or tax-supported institutions, whose business or property is threatened with injury by reason of anything declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of this Act may sue any person, other than a municipal corporation, . . . to enjoin the unlawful practice temporarily or permanently. . . . In any such suit in which the plaintiff substantially prevails on the merits, the plaintiff shall be entitled to recover the cost of suit, including a reasonable attorney's fee based on the fair market value of the attorney services used.

TEX. BUS. & COM. CODE ANN. § 15.21(b).

140. In relevant part, Section 15.21(a)(2) of the TFEAA provides, Any person or governmental entity who obtains a judgment for damages under 15 U.S.C. § 15 or any other provision of federal law comparable to this subsection may not recover damages in a suit under this subsection based on substantially the same conduct that was the subject of the federal suit.

TEX. BUS. & COM. CODE ANN. § 15.21(a)(2).

141. In relevant part, Section 15.21(a)(3) of the TFEAA, provides, On a finding by the court that an action under this section was groundless or brought in bad faith or for the purpose of harassment, the court shall award to the defendant or defendants a reasonable attorney's fee, court costs, and other reasonable expenses of litigation.

TEX. BUS. & COM. CODE ANN. § 15.21(a)(3).

142. In relevant part, Section 15.51(b) of the Code provides,

also in the discretion of the trial court, an *employee* who has entered into an unreasonable covenant not to compete to recover fees incurred in defending against his or her employer.¹⁴³ Both recovery provisions fall within the ambit of the Covenant Not to Compete Act.¹⁴⁴

As with the other statutes addressed in this article, there is generally a duty—absent a showing that claims are intertwined—to segregate fees attributable to claims arising under the Covenant Not to Compete Act from those not covered by the Act.¹⁴⁵

If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court *may* award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

TEX. BUS. & COM. CODE ANN. § 15.51(b).

143. In relevant part, Section 15.51(c) of the Code provides,

If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant de not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, *the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.*

TEX. BUS. & COM. CODE ANN. § 15.51 (Vernon Supp. 2002) (emphasis added); see *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 124 S.W.3d 678, 680 (Tex. App.—Austin 2003, no pet. h.).

144. TEX. BUS. & COM. CODE § 15.51 (Vernon 2002).

145. *Emergicare Sys. Corp. v. Bourdon*, 942 S.W.2d 201, 205 (Tex. App.—Eastland 1997, no writ). In an action involving more than one covenant not to compete where one covenant is found valid and the other void, the court in *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770 (Tex. App.—Beaumont 1992, writ denied) held that remand was necessary to determine what portion of the awarded attorney's fees were attributable to the enforcement of a valid covenant not to compete and what portion was not recoverable for the enforcement of a covenant found to be void and unenforceable such that segregation could be accomplished. *Id.* at 774-75 (citing *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 571 (Tex. 1975); *Pelto Oil Corp. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Indus. Disposal Supply Co.*

In *Perez v. Texas Disposal Systems, Inc.*, the San Antonio Court of Appeals addressed whether a trial court's award of attorneys' fees under Section 15.51(b) to an employer *after* reforming the employer's covenant not to compete contained in the employer's employment contract with its former employees was appropriate.¹⁴⁶ The appellate court found that Section 15.51's "silence on whether an employer can recover attorney's fees if a covenant not to compete *has been reformed* is significant because of the specificity with which Section 15.51 addresses the recovery available to employers and employees in an action to enforce a covenant not to compete,"¹⁴⁷ and therefore held that "[i]f the covenant not to compete does not meet the Section 15.50 criteria and the trial court reforms the covenant, a court may award an employer injunctive relief only."¹⁴⁸

On appeal to the Texas Supreme Court, the Texas Supreme Court held that the plaintiff-employer had additionally sought attorneys' fees pursuant to Section 38.001(8) of the Code (the breach of contract statute), and that the court of appeals erred in not addressing whether attorneys' fees were recoverable pursuant to this alternative basis.¹⁴⁹

On remand from the Texas Supreme Court, the court held that the Covenant Not to Compete Act "preempts an award of attorney's fees under any other statute," including Section 38.001.¹⁵⁰ In so holding, it rejected as unpersuasive, *Williams v. Compressor Engineering Corp.*, a 1986 opinion of the Houston Court of Appeals awarding attorneys' fees to an employer pursuant to Section 38.001 after reforming the scope of a covenant not to compete.¹⁵¹ The court stated that *Williams* may no longer apply because it was decided before the Covenant Not to Compete Act was enacted in 1989.¹⁵² Instead, the court found the preemption language contained in the Covenant Not to Compete Act to be dispositive.¹⁵³ Thus, just as the court of appeals' initial opinion strictly construed

v. Perryman Bros. Trash Serv., Inc., 664 S.W.2d 756, 761 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

146. *Perez v. Tex. Disposal Sys.*, 53 S.W.3d 480, 482-83 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 80 S.W.3d 593 (2002).

147. *Id.* (emphasis added).

148. *Id.* (emphasis added) (citing *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991)).

149. *Tex. Disposal Sys., Inc. v. Perez*, 80 S.W.3d 593, 594 (Tex. 2002).

150. *Perez v. Tex. Disposal Sys., Inc.*, 103 S.W.3d 591, 592 (Tex. App.—San Antonio 2003, *pet. denied*) (emphasis in original).

151. *Williams v. Compressor Eng'g Corp.*, 704 S.W.2d 469, 471 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *see also* *Butler v. Arrow Miller & Glass, Inc.*, 51 S.W.3d 787, 796 (Tex. App.—Houston [1st Dist.] 2001, no *pet.*) (relying on *Williams* to award attorneys' fees pursuant to Section 38.001 in a covenant not to compete case).

152. *Perez*, 103 S.W.3d at 592.

153. *Id.* This preemption language is found at Section 15.52 of the Code and, in relevant part, states,

The criteria for enforceability of a covenant not to compete provided by Section 15.50 of this code and the procedures and remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this code are exclusive and preempt any other criteria for enforceability of a covenant not to compete or procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.

the Covenant Not to Compete Act's attorney fee provision (Section 15.51(b)) to be inapplicable when *any* type of reformation of the covenant was made by the trial court, this "supplemental opinion" on remand similarly strictly construed the Covenant Not to Compete Act's preemption language, stating:

We also strictly construe Section 15.52's language that the "remedies in an action to enforce a covenant not to compete provided by Section 15.51 of this code are exclusive and preempt any other . . . remedies in an action to enforce a covenant not to compete under common law or otherwise." TEX. BUS. & COM. CODE ANN. § 15.52. Just as the Act's criteria for enforcing a covenant not to compete preempt other law, so do the remedies provided under the Act. See *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. App.—Houston [1st Dist.] 1996, no writ) (Act governs enforceability of covenants not to compete, as well as procedures and remedies in an action such as this one). Accordingly, we hold that the Act controls the award of attorney's fees, and Section 15.52 preempts an award of fees under any other law.¹⁵⁴

The plaintiff-employer's petition for review of this supplemental opinion was denied by the Texas Supreme Court. An account of the persuasiveness of the San Antonio Court of Appeals' supplemental opinion will have to await next year's survey. However, the Texas Supreme Court has stated, in the context of addressing an illegal restraint of trade argument, that the Covenant Not to Compete Act's preemption provision "makes clear that the [Texas] Legislature intended the Covenant Not to Compete Act to largely supplant the Texas common law relating to enforcement of covenants not to compete," and thus the strict construction of Section 15.51 in this supplemental opinion is supported by precedent.¹⁵⁵

E. RECOVERING FEES IN CLASS ACTION CASES

a. Enactment of Rule 26.003

Effective September 1, 2003, in all state court class action cases, the "lodestar" method *must* be used to calculate attorneys' fees for class counsel.¹⁵⁶ The newly enacted Texas Civil Practice and Remedies Code Section 26.003 provides:

TEX. BUS. & COM. CODE ANN. § 15.52 (Vernon Supp. 2002).

154. *Id.* at 593-94.

155. *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994).

156. Changes were also made to Federal Rule of Civil Procedure Section 23(h). Section 23(h) provides the procedural mechanism and requirements for an attorneys' fee award in a federal class action where such an award is allowed by law or an agreement of the parties. See FED. R. CIV. P. 23(h). The Advisory Committee makes clear that this provision does not create a new basis for attorneys' fees which is not otherwise available under statute, case law, or agreement. Order of the United States Supreme Court Adopting and Amending the Federal Rules of Civil Procedure, 215 F.R.D. 158, 231 (2003). A party seeking attorneys' fees in a federal class action must file a motion under Rule 54(d)(2). Notice of the motion must be served on all parties and on the class. *Id.* at 23(h)(1). Any class member may object to the motion, and the court may hold a hearing, but must place findings of fact and conclusions of law on the record. *Id.* Finally, the court

(a) If an award of attorneys' fees is available under applicable substantive law, the rules adopted under this chapter must provide that the trial court shall use the Lodestar method to calculate the amount of attorneys' fees to be awarded class counsel. The rules may give the trial court discretion to increase or decrease the fee award calculated by using the Lodestar method by no more than four times based on specified factors.

(b) Rules adopted under this chapter must provide that in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorneys' fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.¹⁵⁷

Section 26.003 expressly allows Texas courts to use a multiplier to enhance fees awarded to class counsel.¹⁵⁸ However, the trial court is limited to a multiplier of four times the lodestar.¹⁵⁹

Prior to the enactment of Section 26.003 the trial court had discretion to use either the percentage method or the lodestar method in awarding class action fees.¹⁶⁰ Section 26.003 impliedly overrules previous Texas authority that permitted an attorneys' fee award to class counsel based on the "percentage method."¹⁶¹

An equally significant change in practice is the provision of Section 26.003 requiring class counsel to be compensated through cash and non-cash benefits in *equal* proportion to the cash and non-cash benefits received by the class as consideration. It is extremely rare for counsel to accept non-cash benefits, but quite common for class members to be compensated with non-cash benefits.¹⁶² Section 26.003's proportionality provision appears to significantly change this practice.

may refer the attorneys' fees motion to a special master or magistrate judge as set out in Rule 54(d)(2)(D). *See id.* at 23(h)(4).

157. TEX. CIV. PRAC. & REM. CODE ANN. § 26.003 (Vernon 2002).

158. *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 870 (Tex. App.—Fort Worth 2001, pet. denied; *see also* *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 262-63 (Tex. App.—Austin 2002) (following *VingCard* but remanding for determination of fees based on reduction of award on prevailing claims).

159. Also, objectors to a class action settlement "are not ordinarily awarded attorneys' fees, except where their efforts have conferred benefits on the class members generally, as distinguished from the objectors themselves particular." *Johnson v. Scott*, 113 S.W.3d 366, 377 (Tex. App.—Beaumont 2003, pet. denied) (quoting *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998)). As the Beaumont Court of Appeals noted, "pursuing a parallel case is not enough to require an award of attorneys' fees." *Johnson*, 113 S.W.3d at 377 (holding trial court did not abuse discretion in denying fees to objectors counsel who pursued argument that benefited class as a whole).

160. *See Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960 (Tex. 1996) ("Both the percentage method and the lodestar method have their strengths and weaknesses, depending on the facts of the case."); *Frost Crushed Stone Co. v. Odell Geer Constr. Co.*, 110 S.W.3d 41, 43-44, 47-48 (Tex. App.—Waco 2002, no pet.).

161. *See Gen. Motors*, 916 S.W.2d at 960.

162. *See Stassi v. Boone*, No. GN200180, 2003 WL 21436995, at *21 (Tex. Dist. Ct. June 6, 2003) (unpublished opinion).

b. The Lodestar method

The lodestar method calculates attorneys' fees by "multiplying the number of hours expended by the attorneys by an appropriate hourly rate determined by a variety of factors, such as the benefits obtained for the [client], the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to the acceptance of the . . . suit, and the hourly rate customarily charged in the region for similar work."¹⁶³ The resulting number is called a lodestar, presumably because the number provides a guiding point—or lodestar—in the determination of an appropriate award.¹⁶⁴

After the lodestar is calculated, the court *may*, in its discretion, apply a multiplier to determine the ultimate amount of attorneys' fees to be awarded.¹⁶⁵ Multipliers are determined by factors such as the complexity of the case, the skill of the attorney, the amount of recovery, and the contingent nature of the case¹⁶⁶ and vary from case to case. As long as the resulting fee is not unreasonable, the amount of the multiplier is largely determined at the discretion of the trial court. Section 26.003 authorizes this lodestar amount to be both increased or *decreased*.

At this point, there is little existing Texas case law regarding the use of the lodestar method and multiplier. The case law that does exist underscores the degree of discretion afforded the trial court regarding the application of a multiplier.

In a recent decision, the Corpus Christi Court of Appeals upheld a jury's award of nearly two times the lawyers lodestar.¹⁶⁷ In so doing, the court emphasized that the case was complex and involved several legal theories, a large amount of evidence, substantial discovery and numerous pretrial hearings, and noted that the pretrial and trial lasted two and one half weeks¹⁶⁸

Similarly, the Corpus Christi Court of Appeals previously held that a multiplier of 1.5 was appropriate in a case where the plaintiff was required to pierce multiple layers of corporate bureaucracy and the jury

163. *Gen. Motors*, 916 S.W.2d at 960 (holding that lodestar is determined by multiplying number of hours reasonably spent by an hourly rate court deems reasonable for similarly complex, non-contingent work); *cf. Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 647 (Tex. App.—Waco 1993, writ denied) (same); *City of Dallas v. Arnett*, 762 S.W.2d 942, 956 (Tex. App.—Dallas 1988, writ denied) (same); *Borg-Warner Protective Servs. Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.) (same).

164. *See Scott A. Brister, Proof of Attorneys' Fees in Texas*, 24 ST. MARY'S L.J. 313, 327 (1993).

165. *See Guity v. C.C.I. Enter., Co.*, 54 S.W.3d 526, 528-29 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (remanding case for evaluation of reasonable fee).

166. *See Crouch*, 853 S.W.2d at 647; *Arnett*, 762 S.W.2d at 956.

167. *Haggar Apparel Co. v. Leal*, 100 S.W.3d 303, 316 (Tex. App.—Corpus Christi 2002, pet. filed) (requesting multiplier of 2.0). *See also Forbush v. J.C. Penney Co.*, 98 F.3d 817, 823 (5th Cir. 1996) (affirming multiplier of 2); *In re Terra-Drill P'ships Sec. Litig.*, 733 F. Supp. 1127, 1131 (S.D. Tex. 1990) (applying 2.5 multiplier).

168. *Haggar Apparel Co.*, 100 S.W.3d at 316.

found for the plaintiff on all liability issues.¹⁶⁹ In another case, the same court of appeals held that a multiplier of two (2) was appropriate where the case was complex and involved numerous theories of recovery, vigorous discovery, a number of pre-trial hearings and a nine-day trial.¹⁷⁰

In *Dillard Department Stores, Inc. v. Gonzales*,¹⁷¹ the El Paso Court of Appeals affirmed a multiplier of two (2) where the case “involved novel and complex issues” such that the controlling federal case law made the case “not just an uphill battle, but an exercise in windmill tilting.”¹⁷²

On the other hand, in *Mission Park Funeral Chapel, Inc. v. Gallegos*,¹⁷³ the San Antonio Court of Appeals refused to apply a multiplier of three (3). The court stated that there “was no testimony that a jury could appropriately use a multiplier to further increase attorneys’ fees beyond the amount calculated using an hourly fee approach,” “there was no jury instruction regarding use of a multiplier,” and “there is no authority for its use in a case such as this.”¹⁷⁴

F. RECOVERING FEES ON OTHER EQUITABLE GROUNDS

Notwithstanding the general rule in Texas that attorneys’ fees are recoverable only if contractual or statutory provision so permits, equitable principles may allow for the recovery of attorneys’ fees if a party is required to prosecute or defend a suit because of the “wrongful act” of its opponent.¹⁷⁵ For example, a party also may be able to recover reasonable and necessary attorneys’ fees and expenses as damages when the defendant’s wrongful conduct forced the plaintiff to prosecute or defend

169. *Borg-Warner Protective Servs. Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.). Notably, in *Borg-Warner*, the Corpus Christi Court of Appeals upheld the use of the Lodestar method in employment discrimination cases. *Id.*; see also *Gorges Foodservice, Inc. v. Huerta*, 964 S.W.2d 656, 672 (Tex. App.—Corpus Christi 1997, pet. withdrawn) (utilizing the Lodestar method in the employment discrimination context).

170. *City of Alamo v. Espinosa*, No. 13-99-704-CV, 2001 WL 1003309, at *14 (Tex. App.—Corpus Christi Aug. 31, 2001, pet. dismissed by agr.) (not designated for publication).

171. *Dillard Dep’t Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412-13 (Tex. App.—El Paso 2002, pet. denied).

172. Further, the *Dillard* court noted that there was ample evidence that the matter was a “daily basis case” and that the attorney gave up multiple other cases to work on the matter. *Id.* at 413.

173. *Mission Park Funeral Chapel, Inc. v. Gallegos*, No. 04-00-00459-CV, 2001 WL 488007, at *5 (Tex. App.—San Antonio, May 9, 2001, no pet.).

174. *Id.* at *5.

175. See *Massey*, 35 S.W.3d at 701; *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838-39 (Tex. App.—Eastland 1984, no writ); see also *Brandtjen & Kluge v. Manney*, 238 S.W.2d 609, 612 (Tex. Civ. App.—Fort Worth 1951, writ refused n.r.e.) but see *Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 898-99 (Tex. App.—Dallas 2003, no pet.); *Ed Rachal Found. v. D’Unger*, 117 S.W.3d 348, 357-58 (Tex. App.—Corpus Christi 2003) (“Neither the Texas Supreme Court nor this Court has adopted any wrongful act exception to the general prohibition against recovery of attorneys’ fees in a tort claim, as we decline to do so in this case.”); *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827 (Tex. App.—Austin 2002, no pet.); *Martin-Simon v. Womack*, 68 S.W.3d 793, 797 n. 2 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Notably, while several courts of appeal have adopted this exception, the Texas Supreme Court has not done so. *Ed Rachal Found.*, 117 S.W.3d at 357-58.

another proceeding.¹⁷⁶ Texas courts have *equitably* extended Section 38.001 (authorizing the recovery of fees in breach of contract actions) to cover certain claims sounding in tort.¹⁷⁷

The common fund doctrine is the most widely recognized exception to the general rule that, absent a statutory or contractual basis for an award of attorney's fees, each litigant must bear his own attorney's fees.¹⁷⁸ "Under the common fund doctrine, the court may allow reasonable attorney's fees to a litigant who, at his own expense, has maintained a suit which creates a fund benefiting other parties as well as himself."¹⁷⁹

The common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the expenses.¹⁸⁰ Attorneys' fees are allowed as a charge against the fund.¹⁸¹ An attorney's compensation from non-contracting plaintiffs under the common fund doctrine is limited to the reasonable value of the attorney's services benefiting them.¹⁸² As long as the litigant has created a fund for others, it need only establish that others have benefited to seek fees from the fund based on the common fund doctrine.¹⁸³

The common fund doctrine was previously generally utilized in class actions.¹⁸⁴ It is not expressly mentioned in Section 26.003. Since Texas must now use the lodestar approach in the context of class action cases, it is likely that the common fund doctrine will continue to hear all application in this area of law.

II. REQUIREMENTS FOR THE RECOVERY OF ATTORNEYS' FEES

Assuming that an attorney has the right—whether by contract, statute, or in equity—to recover attorneys' fees, the amount of the fee must be "reasonable." A fee is unconscionable, and thus, unreasonable, "if a

176. See *Lesikar v. Rappeport*, 33 S.W.3d 282, 317 (Tex. App.—Texarkana 2000, pet. denied); see also *Qwest Communications Int'l, Inc. v. AT&T Corp.*, 114 S.W.3d 15, 32-33 (Tex. App.—Austin 2003, pet. filed); *McCall v. Tana Oil & Gas Corp.*, 82 S.W.3d 337, 344 (Tex. App.—Austin 2001), *rev'd on other grounds*, 104 S.W.3d 80 (Tex. 2003).

177. See *Gill Sav.*, 797 S.W.2d at 31; *Tex. Beef Cattle*, 883 S.W.2d at 430.

178. *City of Dallas v. Arnett*, 762 S.W.2d 942, 954 (Tex. App.—Dallas 1988, writ denied); *Tex. Farmers Ins. Co. v. Seals*, 948 S.W.2d 532, 534 n. 1 (Tex. App.—Fort Worth 1997, no writ).

179. *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 126 (Tex. App.—San Antonio 1995, no writ) (citing *Internal Imp. Trs. v. Greenough*, 105 U.S. 527, 532-37 (1881)); see also *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799-801 (Tex. 1974).

180. *Id.* (citing *Greenough*, 105 U.S. at 533-34; *Knebel*, 518 S.W.2d at 799).

181. *Arnett*, 762 S.W.2d at 954; cf. *Valle v. State Farm Mut. Auto. Ins. Co.*, 5 S.W.3d 745, 746-47 (Tex. App.—San Antonio 1999, pet. denied).

182. *Id.* at 955.

183. See *Camden Fire Ins. Ass'n v. Mo., Ky. & Tenn. Ry. Co. of Tex.*, 175 S.W. 816, 817 (Tex. Civ. App.—Dallas 1915, no writ); *Libhart v. Copeland*, 949 S.W.2d 783, 803-04 (Tex. App.—Waco 1997, no writ).

184. See, e.g., *Arnett*, 762 S.W.2d at 954 (shareholder derivative suits); *Bayliss v. Cernock*, 773 S.W.2d 384, 386-87 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (same); *Camden Fire Ins. Ass'n*, 175 S.W. at 821 (insurance subrogation); *Crouch*, 853 S.W.2d at 645 (upholding award of attorney's fees to class counsel on equitable principle of "common fund").

competent lawyer could not form a reasonable belief that the fee is reasonable . . . [and] the reasonableness of any fee depends on the circumstances of the services."¹⁸⁵ Indeed, an award of attorneys' fees can be larger than a litigants' recovery on its substantive claim and still be "reasonable" in certain circumstances.¹⁸⁶

Texas courts determine whether a fee is "reasonable" based upon the factors specified in Texas Disciplinary Rule of Professional Conduct 1.04.¹⁸⁷ Those factors include:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.¹⁸⁸

Evidence of *each* of the factors is not required to support an attorneys' fees award.¹⁸⁹ However, evidence of *some* of these factors must be pre-

185. *Lopez v. Munoz, Hockema & Reed, LLP*, 22 S.W.3d 857, 867 (Tex. 2000) (Gonzales, J., joined by Phillips, C. J., concurring in part and dissenting in part). The issue whether it is reasonable to *collect* a fee is a separate determination. See *Law Offices of Windle Turley*, 2003 WL 253643, at *4-5 (attempted collection of contingent fee was held to be unconscionable).

186. See *Flint & Assocs.*, 739 S.W.2d at 626 (attorney's fees awarded nearly seven times actual damages); *Hawkins v. Owens*, No. 01-99-00918-CV, 2000 WL 1199254, at *9 (Tex. App.—Houston [1st Dist.] Aug. 24, 2000, pet. denied) (awarding attorney's fees that were two and one-half times larger than the amount paid and judgment awarded, and over five and one-half times the amount of the \$5,000 judgment for contract damages when "case was transformed from what should have been a simple suit on a loan agreement to a lengthy, drawn-out battle extending from 1995 to 1999").

187. The reasonableness of an attorneys' fee award is generally a jury question. See *City of Garland*, 22 S.W.3d at 367-69. However, expert testimony is necessary to establish the reasonableness of attorneys' fees. *Coca-Cola Co.*, 111 S.W.3d at 312.

188. Tex. Disciplinary R. Prof'l Conduct 1.04; see also *Arthur Andersen & Co.*, 945 S.W.2d at 818. The opposing party's attorneys' fees are not necessarily relevant to the analysis. See *MCI Telecomm. Corp. v. Crowley*, 899 S.W.2d 399, 403 (Tex. App.—Fort Worth 1995, orig. proceeding [leave denied]) ("MCI's attorneys' fees in its defense of this case are 'patently irrelevant and are not reasonably calculated to lead to the discovery of admissible evidence.'"); see also *M.D. Mark, Inc. v. PIHI P'ship*, No. 01-98-00724-CV, 2001 WL 619604, at *12-13 (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet.); but see *DiMiceli v. Affordable Pool Maint., Inc.*, 110 S.W.3d 164, 174 (Tex. App.—San Antonio 2003, no pet.) (noting opposing counsel's testimony regarding appellate fees in determining reasonableness of fees).

189. *Burnside Air Conditioning & Heating, Inc.*, 113 S.W.3d at 897; *Columbia Rio Grand Reg. Hosp. v. Stover*, 17 S.W.3d 387, 397 (Tex. App.—Corpus Christi 2000, no pet.);

sent to support an award.¹⁹⁰

A. THE ANDERSEN STANDARD

The most oft cited Texas case regarding the reasonableness of contingent fee awards is *Arthur Andersen & Company v. Perry Equipment Corp.*¹⁹¹ According to *Andersen*, a trial court cannot award attorneys' fees purely on evidence of a percentage fee agreement.¹⁹² Instead, the Court held that a trial court must take into consideration all of the Rule 1.04 factors when making an award of attorneys' fees.¹⁹³

In *VingCard A.S. v. Merrimac Hospitality Systems, Inc.*, the Fort Worth Court of Appeals, interpreting *Andersen*, held that an attorney can still request that the jury calculate attorneys' fees as a percentage of damages awarded.¹⁹⁴ Because the jury in that case "was free to reject his requested percentages under the issue submitted, which required them to award only a specific dollar amount" the award was held *not* to violate the principles articulated by the Texas Supreme Court in *Andersen*.¹⁹⁵ The percentage in *VingCard* was based upon the Rule 1.04 factors and covered all expenses and co-counsel's attorneys' fees.¹⁹⁶

Herring v. Bocquet, 21 S.W.3d 367, 368 (Tex. App.—San Antonio 2000, no pet.). The Amarillo Court of Appeals has held that the court can also consider "the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties." *Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.).

190. See *Castle Tex. Prod. Ltd. P'ship v. Long Trusts*, No. 12-01-00192-CV, 2003 WL 21771718, at *8-9 (Tex. App.—Tyler, July 31, 2003, pet. filed) (holding fee award unreasonable based on lack of testimony regarding Rule 1.04 factors) *City of Weatherford v. Castron*, 83 S.W.3d 261, 272-73 (Tex. App.—Fort Worth 2002, no pet.) (affirming award of fees where evidence was presented on five factors jury questions included an instruction outlining the factors, and the party requested a specific amount of fees); *Hagedorn*, 73 S.W.3d at 341; *Sieber & Calicutt, Inc. v. La Gloria Oil & Gas Co.*, 66 S.W.3d 340, 351 (Tex. App.—Tyler 2001, pet. denied) (upholding trial court's denial of a fee award where there was no evidence to support any of the 1.04 factors); *M.D. Mark, Inc.*, 2001 WL 619604, at *12-13; *Acquila S.W. Pipeline, Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 240-41 (Tex. App.—San Antonio 2001, pet. denied.).

191. *Arthur Andersen & Co.*, 945 S.W.2d at 818. *Andersen* dealt specifically with the award of attorneys' fees in a DTPA action. However, courts have applied *Andersen's* holding to all proceedings where attorneys' fees are "shifted from one party to the other." *Jackson Law Office*, 37 S.W.3d at 24.

192. *Anderson*, 945 S.W.2d at 818; see also *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 106-107 (Tex. App.—San Antonio 2003, pet. denied) (finding evidence insufficient to uphold fee award because "a party seeking fees must ask the jury to award fees in a specific dollar amount."); *Infonova Solutions, Inc. v. Griggs*, No. 04-22-00255-CV, 2003 WL 21467091, *2 (Tex. App.—San Antonio June 25, 2003, no pet.) (affirming denial of fees when only evidence of fees in record was contingency fee contract). *Seacoast, Inc. v. LaCouture*, No. 03-96-00506-CV, 1998 WL 29966, at *8 (Tex. App.—Austin Jan. 29, 1998, pet. denied) (no publication) (reversing fee award where evidence supporting attorneys' fee award consisted of attorney and client testifying to terms of contingent fee agreement).

193. *Anderson*, 945 S.W.2d at 818.

194. *Vingcard*, 59 S.W.3d at 870; see also *Allison*, 98 S.W.3d at 262-63 (following *VingCard* but remanding for determination of fees based on reduction of award on prevailing claims); *Frost Crushed Stone*, 110 S.W.3d at 47-48.

195. *Vingcard*, 59 S.W.3d at 870.

196. *Id.*

Recently, the Austin Court of Appeals, in *Allison v. Fire Insurance Exchange*, followed *VingCard* to uphold a jury's determination of fees as reasonable based on expert testimony regarding the contingency fee contract and the Rule 1.04 factors.¹⁹⁷ *VingCard* and *Allison* are thus important for an attorney with a contingency fee contract requesting damages under the Rule 1.04 factors. Note, however, that the litigant must request a particular amount of fees from the jury or court,¹⁹⁸ and, as discussed, Section 26.003 appears to impliedly overrule the ability of Texas courts to utilize the "percentage method" in awarding fees to class counsel.¹⁹⁹

B. APPLYING THE RULE 1.04 FACTORS

As stated, *Andersen* demands that the Rule 104 be considered in calculating a reasonable fee.²⁰⁰ A recent opinion of the Texarkana Court of Appeals discusses the need for clarity in documentation submitted by counsel to the trial court in support of this Rule 104 consideration.²⁰¹ In *Rolling Lands Investment, L.C. v. Northwest Airport Management, L.P.*, the Texarkana Court of Appeals remanded for a Rule 104 determination of reasonableness and necessity of the litigant's fees despite the submission of a thorough and uncontroverted affidavit in support of the party's fee request.²⁰² The affidavit contained expert testimony that the fees were, in the affiant's opinion and based on the affiant's twenty years of experience in commercial litigation, reasonable and necessary,²⁰³ and also stated that the affiant took into consideration the usual and customary fees in the location of the services, the amount in controversy, the legal questions involved, the fee arrangement with the client, the benefit conferred, and the time required.²⁰⁴ Yet, the Texarkana Court of Appeals looked with suspect on the affiant's statement that the fees were justified for services that "have been or will be rendered,"²⁰⁵ explaining that "[t]he affidavit by its own terms states that attorney's fees are based partly on services that have not even been performed but only expect to be performed."²⁰⁶ While not clear from the opinion, it is likely that the affiant was discussing fees to be awarded in the event of the appeal as those services that "will be rendered," but the lack of clarity resulted in confusion to the appellate court and ultimate reversal of the fee award—an immeasurable price for a phrase that could have been clarified with

197. *Allison*, 98 S.W.3d at 262-63.

198. *Id.* at 263 ("[T]he jury awarded fees in a specific dollar amount, as requested in the charge.").

199. See discussion, *supra* note 159-177.

200. *Andersen*, 945 S.W.2d at 818.

201. *Rolling Lands Invs., L.C. v. N.W. Airport Mgmt., L.P.*, 111 S.W.3d 187, 202-03 (Tex. App.—Texarkana 2003, pet. denied).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

ease.²⁰⁷

III. LOOSE ENDS RELATED TO THE RECOVERY OF ATTORNEYS' FEES IN TEXAS—PRE-PETITION FEES, SEGREGATION OF FEES, AND RECOVERY OF LEGAL ASSISTANT AND APPELLATE FEES

Several considerations overlay the recovery of attorneys' fees in Texas under any statute. Four of these important overlays are discussed herein.

A. PRE-PETITION AND/OR RELATED ACTION FEES

A common question that arises in the fee recovery stage of a case is whether attorneys' fees incurred *before* the filing of a suit can be recovered.²⁰⁸ In *Williamson v. Tucker*, the Dallas Court of Appeals held that pre-petition fees incurred from the point of placing a note in the hands of an attorney for collection and participation in a *related* federal suit were recoverable.²⁰⁹ The Texas Supreme Court subsequently cited this holding

207. Related to the point made in this case, it is important to remember to properly designate an expert on attorneys' fees in discovery pursuant to the Texas Rules of Civil Procedure. *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671 (Tex. 1990). Failure to comply with this requirement results in exclusion of testimony unless the proffering party demonstrates good cause for its admission. *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). For example, in *GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*, 693 S.W.2d 617, 620-21 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.) the plaintiff's counsel called himself as an expert witness regarding attorneys' fees, but he had not identified their attorney as a testifying expert in discovery. The San Antonio Court of Appeals held that testimony of the plaintiff's counsel should have been excluded by the trial court due to plaintiff's failure to identify counsel as a fee expert. *Id.*; see also *Nelson v. Schanzer*, 788 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1990, writ denied.); but see *Wilson v. Chazanow*, 105 S.W.3d 21, 28 (Tex. App.—Corpus Christi 2002, no pet.) (affirming trial court's admission of attorney testimony when attorney was mistakenly designated as fact witness instead of expert witness in pretrial disclosures). However, at least one Texas court has held that an attorney who has not been identified as an *expert* witness with regard to attorney fees can still testify as a *fact* witness regarding the *facts* of his representation. *Budd v. Gay*, 846 S.W.2d 521, 524 (Tex. App.—Houston [14th Dist.] 1993, no writ); TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 *et seq.* (Vernon 2001); see also *In re Striegler*, 915 S.W.2d 629, 643-44 (Tex. App.—Amarillo 1996, writ denied).

208. Because questions like this often arise, it is important to keep adequate documentation of all services rendered by an attorney in furtherance of a client's case. To recover attorneys' fees, a litigant must produce adequate documentation of the hours expended. See *League of United Latin Am. Citizens No. 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1233 (5th Cir. 1997). "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *LULAC*, 119 F.3d at 1233 ("[i]f the applicant's documentation of the hours claimed is 'vague or incomplete,' the district court may reduce or eliminate those hours."). "Litigants take their chances when submitting . . . fee applications . . . provid[ing] little information from which to determine the 'reasonableness' of the hours expended on tasks vaguely referred to." See *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 327 (5th Cir. 1995); see also *Sieber & Calicutt*, 66 S.W.3d at 340. However, there is no special documentation that is required. *Hanif v. Alexander Oil Co.*, No. 01-01-00954-CV, 2002 WL 31087247, at *3-4 (Tex. App.—Houston [1st Dist.] Sept. 19, 2002, no pet.) ("None of the eight [1.04] factors mandates that time records be kept or precludes an estimate.").

209. *Williamson*, 615 S.W.2d at 893; see also *Swiss Ave. Bank v. Slivka*, 724 S.W.2d 394, 398 (Tex. App.—Dallas 1986, no writ) (holding that a party is entitled to recover attorneys fees incurred by it in defending a prior injunction proceeding).

with approval.²¹⁰ In *Republic Bank Dallas, N.A. v. Shook*, the Texas Supreme Court held that a bank forced to *defend* against a borrower's claims before recovering the outstanding balance of a note it held could recover all of its attorneys' fees. This was true despite the fact that counsel had actually spent only a few hours on the cause of action for collection on the *note* as opposed to the borrower's claim.²¹¹

Similarly, several courts have allowed legal fees in related matters to be recovered absent a clear entitlement.²¹²

B. SEGREGATION

Another common and practical problem regarding the recovery of attorneys' fees is how to recover fees for work performed in furtherance of a claim for which attorneys' fees are statutorily authorized when other claims for which attorneys' fees are *not* statutorily authorized are also asserted in the same case. The general rule in Texas is that "in a case involving more than one claim, attorneys' fees can be awarded only for necessary legal services rendered in connection with the claims from which recovery is authorized."²¹³ In fact, "[a] failure to segregate attorneys' fees in a case containing multiple causes of action, only some of which entitle the recovery of attorneys' fees, can result in the recovery of zero attorneys' fees."²¹⁴

However, where the claims are "dependent upon the same set of facts or circumstances and are thus intertwined to the point of being inseparable, the party suing for attorneys' fees may recover the entire amount

210. *Republic Bank Dallas, N.A. v. Shook*, 653 S.W.2d 278, 282-83 (Tex. 1983).

211. *Id.*

212. *Gill Sav. Ass'n*, 797 S.W.2d at 32 (disapproving of the holding of the court of appeals that, as a matter of law, attorneys fees incurred in a related bankruptcy proceeding cannot be awarded in a breach of contract claim); *Boulware v. Sec. State Bank of Navasota, Tex.*, 640 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1982, no writ) (holding that party could recover attorneys' fees incurred prosecuting related claim in Court of Claims to recover balance of a note); *see also McAdams v. McAdams*, No. 07-01-0343-CV, 2002 WL 342639, at *13 (Tex. App.—Amarillo Mar. 1, 2002, no pet.) (no publication) (awarding fees incurred in first trial prior to appeal).

213. *Flint & Assocs.*, 739 S.W.2d at 624; *see also Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 97 S.W.3d 779 (Tex. App.—Dallas 2003, pet. filed); *Am. Hallmark Ins. Co. v. Lyde*, No. 05-97-01611-CV, 2000 WL 1702597, at *9 (Tex. App.—Dallas Nov. 15, 2000, pet. denied) ("segregation of attorneys' fees is required between claims which allow recovery of fees and claims which do not."). This rule also applies to claims against different parties. *See Willis v. Donnelly*, 118 S.W.3d 10 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("[W]hen a lawsuit involves multiple claims or multiple parties, the proponent has a duty to segregate non-recoverable fees from recoverable fees, and to segregate the fees owed by different parties."); *Flagship Hotel*, 117 S.W.3d at 565 ("The general rule is that attorney's fees attributable to other defendants . . . must be segregated."). However, this rule does not require a party to segregate time spent on different theories of the same cause of action. *Id.*

214. *Green Int'l*, 951 S.W.2d at 389. However, at least one court of appeals in Texas has held that, in a *breach of contract* case, a party prevailing on a breach of contract claim who fails to segregate fees for non-recoverable claims should not be completely denied fees. *See Willis*, 118 S.W.3d at 48 n.29. Of course if objection to such a failure to segregate is not made, the objection to recovery of all fees is waived. *Id.*; *Mekdessi v. RISC, Inc.*, No. 2-02-169-CV, 2003 WL 1564304, at *4 (Tex. App.—Forth Worth Mar. 27, 2003, pet. denied).

covering all claims.”²¹⁵ For this exception to apply, the claims must be so similar that the same facts must need to be proved for both claims to succeed.²¹⁶ In modern business litigation, this exception appears to be more common than the rule.²¹⁷

Of course, to be entitled to all of a group of intertwined fees, the party seeking fees must have prevailed on the claim that provides for the recovery of fees.²¹⁸ Further, the court—not the fact finder—makes the determination of whether fees must be segregated.²¹⁹ To be sustained on appeal, the trial court must specifically perform this segregation analysis when evaluating the attorneys' fee award.²²⁰

Similarly, the general rule in Texas is that segregation of fees is required if a litigant prosecutes a counterclaim that permits recovery of attorneys' fees and also defends a claim in the same action; however, segregation is not required if the fees cannot be allocated between prosecuting the counterclaim and defending the claims.²²¹ Or, stated another way, if the plaintiff must defeat the counterclaim to succeed on the principal claim because they arise out of the same facts and are mutually exclusive, then the time spent to defend against the counterclaim need not be segregated from the time spent pursuing the claim.²²²

215. *Id.*; *S. Concrete Co. v. Metrotec Fin. Inc.*, 775 S.W.2d 446, 449-51 (Tex. App.—Dallas 1989, no writ); *World Help*, 977 S.W.2d at 684; *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 288 (Tex. App.—Corpus Christi 1992), *aff'd as modified*, *Schindler v. Austwell Farmer Coop.*, 841 S.W.2d 853 (Tex. 1992)) (granting total amount of fees billed when “causes of action are so intertwined that they are more or less inseparable”); *City of Alamo*, 2001 WL 1003309, at *13.

216. *See, e.g., Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 551 (Tex. App.—El Paso 2001, no pet.); *Lesikar*, 33 S.W.3d at 317. The Texarkana Court of Appeals recently noted that the test can be met “with evidence of unsegregated attorneys' fees and a rough percent of the amount attributable to the breach of contract claim.” *Flagship Hotel*, 117 S.W.3d at 566 n.7.

217. There are, however, several cases in which courts have found that this test was not satisfied and refused to award the party all attorneys' fees. *See Flagship Hotel*, 117 S.W.3d at 565-66 (holding that declaratory judgment claim involved different legal and factual arguments than breach of contract claim).

218. *Huddleston v. Pace*, 790 S.W.2d 47, 51 (Tex. App.—San Antonio 1990, writ denied).

219. *Merch. Ctr., Inc. v. WNS, Inc.*, 85 S.W.3d 389, at 398 (Tex. App.—Texarkana 2002, pet. denied).

220. *Rainbow Group, Ltd.*, 2002 WL 1991141, at *11. Of course, an objection to the opposing party's failure to segregate fees is waived if objection is not made at the time the evidence of fees is presented or at the time of the charge. *Beard Family P'ship v. Commercial Indem. Ins. Co.*, 116 S.W.3d 839, 850 (Tex. App.—Austin 2003, no pet.); *Holmes v. Concord Holmes, Ltd.*, 115 S.W.3d 310, 313 (Tex. App.—Texarkana 2003, no pet.).

221. *Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 130 (Tex. App.—Corpus Christi 1999, pet. denied); *Coleman v. Rotana, Inc.*, 778 S.W.2d 867, 873-74 (Tex. App.—Dallas 1989, writ denied); *Wilkins v. Bain*, 615 S.W.2d 314, 316 (Tex. Civ. App.—Dallas 1981, no writ) (granting all fees when “claim to recover the contract price necessarily involved the same facts as [the] counterclaim both arise out of the same transaction; thus, whether the contract was oral or written”).

222. *Pegasus Energy Group, Inc.*, 3 S.W.3d at 130; *but see Willis*, 118 S.W.3d at 48 (reversing and remanding fee award for failure to segregate fees in defending counterclaims and jury charge asked for award of all fees in case).

C. LEGAL ASSISTANT FEES

Although the Texas Supreme Court has not expressly spoken on the issue whether legal assistant fees are recoverable as part of attorneys' fees in any given statute authorizing the recovery of attorneys' fees, the Dallas Court of Appeals, in *Gill Savings Association v. International Supply Co.*,²²³ set forth the basic test: "[C]ompensation for a legal assistant's work may be separately assessed and included in the award of attorney's fees if a legal assistant performs work that has traditionally been done by any attorney."²²⁴ To recover for the work of a legal assistant, five considerations are important: "(1) that the legal assistant is qualified through education, training or work experience to perform substantive legal work; (2) that substantive legal work was performed under the direction and supervision of an attorney; (3) the nature of the legal work which was performed; (4) the hourly rate being charged for the legal assistant; and (5) the number of hours expended by the legal assistant."²²⁵

The *Gill Savings* court ultimately determined that the evidence presented at trial was insufficient to support an award of attorneys' fees because the time sheets submitted to the court did not establish the qualifications, if any, of the legal assistants who performed the work, whether the tasks performed by the legal assistants were of a substantive legal nature or were the performance of clerical duties, or the hourly rate charged for the legal assistants.²²⁶ The court also held that without testimony identifying the initials in the timesheets, it was impossible to determine which class of professionals—qualified legal assistants or legal clerks—had performed the relevant tasks.²²⁷

In *Moody v. EMC Services, Inc.*,²²⁸ the Houston (Fourteenth District) Court of Appeals followed the test established in *Gill Savings*.²²⁹ Even though the claimant failed to specifically identify the legal assistants or

223. 759 S.W.2d 697.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*; see also *Law Offices of Rodney R. Elkins v. Alexander*, No. 05-95-00446-CV, 1996 WL 167923, at *6 (Tex. App.—Dallas Apr. 8, 1996, no writ) (holding the "[b]ecause [the plaintiff] offered no evidence about the qualifications or supervision of legal assistants, the trial court did not err in concluding there was insufficient evidence to justify awarding fees for services of legal assistants"); but see *Chevron Chem. Co. v. Southland Contracting, Inc.*, No. 05-96-00560-CV, 1998 WL 640987, at *4-5 (Tex. App.—Dallas Sept. 21, 1998, pet. denied) (upholding the award of attorneys' fees without any consideration of work performed by legal assistants and concluding "that because [the prevailing party] did not request any award of attorney's fees for work performed by legal assistants, the trial court did not abuse its discretion in refusing to submit [the non-prevailing party's] proposed jury instruction delineating the *Gill Savings* factor for recovery of legal assistant fees"); but see *Nat'l Dev. & Research Corp. v. Panda Global Energy Co.*, No. 05-00-00820-CV, 2002 WL 1060483, at *8 n.4 (Tex. App.—Dallas May 29, 2002, pet. denied) (upholding \$26,000 in attorneys' fees based on the work of "para professionals" because the fee statements show the name of each person performing the work, the nature of the work, and the time and rate of each person).

228. *Moody v. EMC Servs., Inc.*, 828 S.W.2d 237, 248 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

229. *Id.*

their qualifications; however, the court affirmed the award for attorney's fees, including work performed by legal assistants.²³⁰

D. APPELLATE FEES

An additional question that often arises with respect to the recovery of attorneys' fees involves the recovery of fees for appellate work. Texas juries are routinely asked to award fees for appellate work that will only be paid in the event such work is undertaken *successfully*.²³¹ A fee request for appellate work should be segregated into fees for work to be performed on direct appeal to the court of appeals and on petition for hearing by the Texas Supreme Court and should be supported by sufficient evidence.²³² Appellate fee awards are often reformed by the courts.²³³

IV. RECOVERY OF COSTS AND EXPENSES

Similar to attorneys' fees, costs and expenses are *not* recoverable unless there is a statute which expressly provides for recovery of the same.²³⁴

A. RECOVERING COSTS

As a general rule "each party to a suit shall be liable to the officers of the court for all costs incurred by himself."²³⁵ However, many costs are recoverable by statute. For example, Section 31.007 of the Code allows a judge to "include in any order or judgment all costs," including:

1. Clerk's fees and any service fees due to the county;
2. Court reporter's fees for original stenographic transcripts obtained to use in the suit;

230. *Id.*

231. A trial court may not award a litigant an unconditional award of attorney's fees for an appeal. *Tex. Farmers Ins. Co. v. Cameron*, 24 S.W.3d 386, 400-01 (Tex. App.—Dallas 2000, pet. denied). "To do so, could penalize a party for pursuing a mentioned appeal." *Id.*; see also *Weynand v. Weynand*, 990 S.W.2d 843, 847 (Tex. App.—Dallas 1999, pet. denied); *Humble Nat'l Bk. v. DCV, Inc.*, 933 S.W.2d 224, 236 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

232. *Chrysler-Plymouth City, Inc. v. Guerrero*, 620 S.W.2d 700, 706-07 (Tex. Civ. App.—San Antonio 1981, no writ) (holding that a jury award of attorneys' fees including potential appellate work was supported by sufficient evidence in the record); *Holland v. Nelson*, No. 05-02-00283-CV, 2003 WL 22180444, at *2 (Tex. App.—Dallas Sept. 23, 2003, pet. denied) (remanding case based on lack of evidence to support award of attorneys' fees on appeal); see also *Centroplex Ford, Inc. v. Kirby*, 736 S.W.2d 261, 264 (Tex. App.—Austin 1987, no writ).

233. See *Bradbury v. Scott*, 788 S.W.2d 31, 40 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

234. "Ordinary expenses occurred by a party in prosecuting or defending suit cannot be recovered either as damages or by way of court costs in the absence of statutory provisions or usages of equity." *Flint & Assocs.*, 739 S.W.2d at 626; see also *Brandtjen & Kluge*, 238 S.W.2d at 609. To the extent possible, the award should also be segregated into the amount attributable to the portion of the case that successful on appeal. *Holland*, 2003 WL 22180444, at *2.

235. TEX. R. CIV. P. 140.

3. The fee for masters, interpreters, and guardians ad litem appointed by the court; and

4. Such other costs and fees as may be permitted by these rules and state statutes.²³⁶

More importantly, Rule 131 of the Texas Rules of Civil Procedure entitles a successful party to recover “all costs incurred therein” from its adversary.²³⁷ “Rule 131’s underlying purpose is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs,”²³⁸ and the court can stray from this mandatory requirement only “for good cause.”²³⁹

“‘Good cause’ is an elusive concept that varies from case to case.”²⁴⁰ Generally “good cause” will be found when a party unnecessarily pro-longs proceedings, unreasonably increases costs, or generally does some act worthy of sanction.²⁴¹ If the court determines costs should *not* be awarded, then “good cause” for such an award must be specifically stated on the record.²⁴² Furthermore, even when the trial court states good cause on the record “an appellate court should scrutinize the record to determine whether it supports the trial judge’s decision.”²⁴³

This Survey period, the Texas Supreme Court addressed the degree of specificity required to depart, for “good cause,” from the general rule that the prevailing party recover costs pursuant to Rule 131 of the Texas Rules of Civil Procedure.²⁴⁴ In *Roberts v. Williamson*, the Texas Supreme Court upheld the reversal of the trial court’s apportionment of guardian ad litem costs between the plaintiff-parents and the defendant-doctor in a medical malpractice case.²⁴⁵ Although the trial court had explained its reasons for splitting the ad litem costs, it had *not* done so with the speci-

236. TEX. CIV. PRAC. & REM. CODE ANN. § 31.007 (Vernon 2001).

237. TEX. R. CIV. P. 131. However, it should be noted that the statute provides for recovery of costs “except where otherwise provided.” *Id.*

238. *Furr’s Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001).

239. TEX. R. CIV. P. 141. Note, however, that the Declaratory Judgment Act provides for the award of costs to either party as are equitable and just. TEX. CIV. PRAC. & REMEDIES CODE § 37.009; *see, e.g., W. Beach Marina, Ltd.*, 94 S.W.3d at 270.

240. *Furr’s*, 53 S.W.3d at 377.

241. *Id.* Potential emotional harm from assessing costs to the losing party is not “good cause” as a matter of law.

242. *Furr’s*, 53 S.W.3d at 376.

243. *Allen v. Crabtree*, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ) (citing *Rogers v. Wal-Mart Stores, Inc.*, 686 S.W.2d 599 (Tex. 1985)).

244. *Roberts*, 111 S.W.3d at 124-25. Specifically, the trial court had stated that, I think that an attorney ad litem is there for the benefit of all the parties that are there. I would like to, for this to be assessed as court costs, and I would like for it to be split between the Plaintiffs and between the Defendant in that particular regard. And I think that way, it would be a little bit more fair to all parties that are concerned. And I don’t think simply because there was a verdict returned against an individual, that he pays it all. We’re looking at a situation where the Court feels that it would be in the best interest of the child for this individual to be appointed. And, therefore, as a result of that, it should be assessed as a court cost, and be born one half by [the Defendant], and one half by [the Plaintiffs].

Id. at 123.

245. *Id.*

ficity required by Rule 141 of the Texas Rules of Civil Procedure.²⁴⁶

Specifically, the Texas Supreme Court stated that “[c]ertainly, fairness can be good cause, but the record must substantiate the connection.”²⁴⁷ In so stating, it distinguished its prior opinion in *Rogers v. Wal-Mart Stores, Inc.*, where the trial court “had demonstrated good cause when assessing part of the ad litem costs against the prevailing party because the conduct of that party had unnecessarily prolonged and obstructed the trial.”²⁴⁸ In contrast to *Rogers*, the court found the record in this case to be insufficient: “Here, the trial court’s finding of good cause is premised on the perception that the prevailing party incidentally benefited from the guardian ad litem’s services. Assuming that such an incidental benefit might in a particular case provide good cause, Rule 141 still requires that the trial court state its reasons ‘on the record’ and with more specificity than the court’s general notion of fairness here.”²⁴⁹

B. NON-RECOVERABLE COSTS

Some costs are specifically disallowed, either by statute or case law. For example, Rule 902(10)(a) of the Texas Rules of Evidence requires a party to bear its own copying costs if it chooses to copy records attached to affidavits filed by another party.²⁵⁰ Similarly, Texas Rule of Civil Procedure 140 prohibits including fees for copies in an award of costs.²⁵¹ Case law also disallows certain items, such as expert witness fees²⁵² and costs for certified copies of deeds used at trial.²⁵³ For example, the Dallas Court of Appeals has held that ordinary expenses like photocopy, travel, long distance, postage, filing fees, fax charges, and messenger/courier expenses are typically not recoverable as expenses because they are consid-

246. *Id.*

247. *Roberts*, 111 S.W.3d at 124.

248. *Id.* (citing *Rogers*, 686 S.W.2d at 601).

249. *Id.* (quoting TEX. R. CIV. P. 141); see also *Ray v. McFarland*, 97 S.W.3d 728, 730-31 (Tex. App.—Fort Worth 2003, no pet.) (reversing the trial court’s judgment setting aside the jury verdict on good faith and just cause and holding that “[a]ccordingly, [the plaintiff] was the successful party at trial” and since “the judgment did not state that the trial court was holding [the plaintiff] responsible for her own costs for ‘good cause,’” the trial court abused its discretion in taxing court costs against the party incurring them) (quoting TEX. R. CIV. P. 141)); *Moore v. Trevino*, 94 S.W.3d 723, 729 (Tex. App.—San Antonio 2002, pet. denied) (“Because appellees were the prevailing parties below and ‘good cause’ for not awarding costs to them is not stated on the record, the trial court abused its discretion in failing to award appellees costs pursuant to Rule 131.”); *Finlay v. Olive*, 77 S.W.3d 520, 528 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (finding the trial court abused its discretion in not awarding costs to the successful party and stating that “we do not presume that the trial court made the necessary finding in this situation”); *Dean’s Campin’ Co. v. Hardsteen*, No. 01-00-01190-CV, 2002 WL 1980840, at *7 (Tex. App.—Houston [1st Dist.] Aug. 29, 2002, pet. denied) (“Ability to pay . . . does not constitute good cause, as contemplated by rule 141, to depart from the general rule stated in Rule 131.”).

250. See *Allen*, 936 S.W.2d at 8; TEX. R. CIV. EVID. 904(10)(a).

251. TEX. R. CIV. P. 140 provides that “no fee for a copy of a paper not required by law or these rules to be copied shall be taxed in the bill of costs.” *Id.*

252. See *City of Houston v. Biggers*, 380 S.W.2d 700, 705 (Tex. Civ. App.—Houston 1964, writ ref’d n.r.e.). See also *Allen*, 936 S.W.2d at 8.

253. *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.); see also *Allen*, 936 S.W.2d at 8.

ered part of “the overhead of a law practice” and can be recovered as a component of reasonable attorneys’ fees at least pursuant to Aection 38.001.²⁵⁴

V. CONCLUSION

This article is intended to update business litigants on recent developments in the field of recovering attorneys’ fees and to provide these business litigants with tools helpful in recovering or defending against the recovery of attorneys’ fees in Texas. As with any field of law, this recovery is an art, not a science, is ever-changing, and oft times requires trial and error to succeed.

254. *Flint*, 739 S.W.2d at 626; *Arthur’s Garage, Inc. v. Racial-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 817 (Tex. App.—Dallas 1999, no pet.).