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# **ATTORNEY'S FEES: FIVE RECENT CASES YOU MUST KNOW**

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# ATTORNEY'S FEES: FIVE RECENT CASES YOU MUST KNOW

BY STACEY CHO

Generally, in Texas, each litigant must pay its own attorney's fees. It is therefore important to recognize the limited circumstances where the recovery of fees is allowed. The ability to recover attorney's fees can be an important issue to consider when determining whether to file a lawsuit. This is especially true when the amount of attorney's fees can far exceed the actual damages in a lawsuit. This paper will discuss when attorney's fees are recoverable, how to recover them, and how to avoid some of the common pitfalls in the recovery process.

## A. Recovery of Attorney's Fees Under Chapter 38 of the Texas Civil Practice and Remedies Code

Under Texas law, attorney's fees are not recoverable unless authorized by statute or contract.<sup>1</sup> This rule is commonly referred to as "the American Rule."<sup>2</sup> Many statutes provide for the recovery of attorney's fees.<sup>3</sup> This paper will focus on the most commonly cited statute, Chapter 38 of the Texas Civil Practice and Remedies Code which provides as follows:

### § 38.001. Recovery of Attorney's Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an oral or written contract.

### § 38.002. Procedure for Recovery of Attorney's Fees

To recover attorney's fees under this chapter:

- (1) the claimant must be represented by an attorney;
- (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
- (3) payment for the amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

### § 38.003. Presumption

It is presumed that the usual and customary attorney's fees for a claim of the type described in section 38.001 are reasonable. The presumption may be rebutted.

### § 38.004. Judicial Notice

The court may take judicial notice of the usual and customary attorney's fees and of the contents of the case file without receiving further evidence in:

- (1) a proceeding before the court; or
- (2) a jury case in which the amount of attorney's fees is submitted to the court by agreement.

### § 38.005. Liberal Construction

This chapter shall be liberally construed to promote its underlying purposes.

### § 38.006. Exceptions

This chapter does not apply to a contract issued by an insurer that is subject to the provisions of:

- (1) Title 11, Insurance Code;
- (2) Chapter 541, Insurance Code;
- (3) the Unfair Claim Settlement Practices Act (Subchapter A, Chapter 542, Insurance Code); or
- (4) Subchapter B, Chapter 542, Insurance Code.

It is important to note that Chapter 38 is not a prevailing party statute. Chapter 38 allows a prevailing *plaintiff* to recover attorney's fees. It does not allow a prevailing defendant who successfully defends against a claim to recover attorney's fees.<sup>4</sup> Moreover, attorney's fees are only recoverable if a party prevails on a cause of action for which

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<sup>1</sup> *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

<sup>2</sup> *Id.*; see also *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 602 (2001).

<sup>3</sup> For example, the Deceptive Trade Practices Act, the Insurance Code, the Declaratory Judgment Act, and the Texas Commission on Human Rights Act provide for the recovery of attorney's fees.

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<sup>4</sup> See *Brockie v. Webb*, 244 S.W.3d 905, 910 (Tex. App.—Dallas 2008, pet. denied); *Energen Res. MAQ, Inc. v. Dalbosco*, 23 S.W.3d 551, 558 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

attorney's fees are recoverable and recovers damages.<sup>5</sup>

The first thing a prevailing plaintiff must do to recover attorney's fees is to demand and present them for payment to the defendant or defendant's authorized agent.<sup>6</sup> Presentment simply consists of a demand or request for payment. It can either be written or oral.<sup>7</sup> No particular form of demand or presentment is required.<sup>8</sup> The claim can be made either before or after filing suit.<sup>9</sup> Although no particular form is required, the act of filing suit alone is not sufficient to constitute a demand and present under Chapter 38.<sup>10</sup>

A prevailing plaintiff must also be represented by an attorney to recover attorney's fees. This can include in-house counsel, a law firm represented by its own attorneys, and an attorney who represents him or herself.<sup>11</sup>

#### **THE FIRST CASE YOU MUST KNOW:**

##### **Which entities are immune from attorney's fees?**

*Fleming & Assocs. LLP v. Barton*, 425 S.W.3d 560 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014, pet. denied).

The term "person" under TEX. CIV. PRAC. REM. CODE § 38.001 is defined as a corporation, organization, the government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.<sup>12</sup> Many do not appreciate

that liability for attorney's fees is limited to individuals and corporations, resulting in courts awarding fees against partnerships, limited liability companies, and limited partnerships. However, as a matter of first impression, the Fourteenth District Court of Appeals in *Fleming & Associates LLP v. Barton*, recently held that Section 38.001 does not authorize the recovery of attorney's fees against a partnership, because a "partnership is neither an individual nor a corporation."<sup>13</sup> The dispute in *Fleming & Associates* involved a referral agreement between lawyers involved in a pharmaceutical litigation over what expenses could be charged to a referring lawyer under the parties' agreement.<sup>14</sup> The plaintiff claimed that the defendant breached the parties' contract by withholding approximately \$2.3 million in disputed litigation expenses from the amount the defendant paid to plaintiff under the referral agreement.<sup>15</sup> The plaintiff law firm also sought attorney's fees under Section 38.001.<sup>16</sup>

At the trial court level, the plaintiff law firm prevailed on its breach of contract claim and was awarded its reasonable and necessary attorney's fees pursuant to Section 38.001.<sup>17</sup> The defendant law firm appealed the judgment, asserting (among other points of error) that the trial court erred by awarding attorney's fees under Section 38.001 because the plaintiff law firm was a limited liability partnership and therefore was neither an "individual" nor a

<sup>5</sup> *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384 (Tex. 1997).

<sup>6</sup> *Goodin v. Jolliff*, 257 S.W.3d 341, 349 (Tex. App.—Fort Worth 2008, no pet.).

<sup>7</sup> *Id.* at 349.

<sup>8</sup> *Id.*

<sup>9</sup> *Bd. of Cnty. Comm'rs v. Amarillo Hosp. Dist.*, 835 S.W.2d 115, 127 (Tex. App.—Amarillo 1992, no writ); *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 868 (Tex. App.—Fort Worth 2001, pet. denied).

<sup>10</sup> *Goodin*, 257 S.W.3d at 349.

<sup>11</sup> *Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 766-67 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (in-house counsel entitled to recover attorneys' fees); *Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398, 400 (5th Cir. 1989) (law firm entitled to fees after being represented by own attorney); *Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex. App.—Eastland 1994, writ denied) (pro se attorney entitled to recover fees).

<sup>12</sup> TEX. GOV'T CODE § 311.005(2).

<sup>13</sup> 425 S.W.3d 560 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014, pet. denied). Prior to this state court opinion, federal district courts have tackled the issue and ruled similarly. *See Ganz v. Lyons P'ship, L.P.*, 173 F.R.D. 173, 176 (N.D. Tex. 1997) (Urbom, J.) (holding that attorney's fees are not recoverable from a partnership or limited partnership because, in drafting § 38.001, Texas legislature "eliminated [the word 'person' from the second clause] and substituted 'individual,' a narrower term that by common meaning does not include a partnership, limited or otherwise."); *Baylor Health Care Sys. v. Nat'l Elevator Indus. Health Benefit Plan*, No. 3:06-CV-1888-P2008 WL 2245834, at \*6 (N.D. Tex. Jun. 2, 2008) (Solis, J.) ("[T]he Court finds that the plain language of Section 38.001 of the Texas Civil Practice[] & Remedies code is unambiguous and that an ERISA plan . . . is not an 'individual or corporation' under Section 38.001[.]").

<sup>14</sup> *Fleming & Assocs., LLP v. Barton*, 425 S.W.3d 560, 562-63 (Tex. App.—Houston [14th Dist.] Feb. 27, 2014, pet. denied).

<sup>15</sup> *Id.* at 564.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 567.