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PROVING YOUR ATTORNEY FEES IN LITIGATION

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I. INTRODUCTION

The last few years have seen significant developments in Texas state and federal law on the requirements for proving attorney's fees in civil litigation. Below is a discussion of recent significant cases on proving attorney's fees.

II. SPECIFIC TYPES OF CLAIMS

Correctly identifying the basis for recovering fees is crucial to proving an entitlement to fees. When a party pleads a specific ground for recovery of attorney's fees, the party is limited to that ground and cannot recover attorney's fees on another, unpled ground. *See Kreighbaum v. Lester*, No. 05-06-01333-CV, 2007 WL 1829729, *2-3 (Tex. App.—Dallas June 27, 2007, no pet. h.) (because appellants' counterclaim specifically requested attorney's fees under Section 17.50(c) of the Business and Commerce Code, appellant could not seek fees on another basis in reliance on a prayer for relief containing a nonspecific request for attorney's fees). However, a party is not required to specifically plead the applicable statute in order to recover attorney's fees under it. *Gibson v. Cuellar*, No. 14-12-00644-CV, 2013 WL 4759593 (Tex. App.—Houston [14th Dist.] 2013, no pet. h.) (finding claim for attorney's fees was properly pleaded in plaintiff's petition when the claim was included in the breach of contract claim and generally in the prayer, despite not referencing Section 38.001 of the Texas Civil Practice & Remedies Code).

Recent cases on specific grounds for fee recovery are discussed below:

A. CPRC Chapter 38 Recovery

1. Types of actions covered

Under section 38.001 of the Civil Practice and Remedies Code, 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.

TEX. CIV. PRAC. & REM CODE § 38.001.

The Texas Supreme Court has held that a party may recover attorney's fees under a breach of express warranty claim pursuant to section 38.001(8). *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55 (Tex. 2008).

While Chapter 38 expressly applies to actions for recovery on an oral or written contract, parties to a particular contract may agree to fee-recovery arrangements that are stricter or more lenient than those imposed by Chapter 38. *See, e.g., Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 661 (Tex. App.—Dallas 2012, no pet.) (failure to present claim as required by §38.002(2) did not preclude award of attorney's fees where lease agreement's attorney's fee provision did not require presentment as prerequisite).

2. Elements of recovery

To recover attorney's fees under section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages. *See Imperial Lofts, Ltd. v. Imperial Woodworks, Inc.*, 2007 WL 4157245, *4 (Tex. App.—Waco Nov. 7, 2007, no pet. h.) (citing *Green Intl., Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex.1997)).

In *Intercontinental Group P'ship v. KB Home Lone Star LP*, 295 S.W.3d 650 (Tex. 2009), a jury found that a property developer breached a written contract with a homebuilder but awarded no damages, although it did award \$66,000 in attorney's fees. The trial court entered judgment for the homebuilder in the amount of the jury's attorney's fee award, which was affirmed by the court of appeals. The developer petitioned for review in the Supreme Court, where the homebuilder argued that while the jury's failure to award damages precluded an award of attorney's fees under Chapter 38, the fee award was nonetheless proper because the underlying contract provided for recovery of attorney's fees by the "prevailing party" in any dispute on the contract. In a 5-4 majority opinion, the Supreme Court reversed the judgment, holding that the jury's finding of breach may have made the builder "a nominal winner" but that it was not a "prevailing party" where it received no award on its claim for monetary damages, no declaratory or injunctive relief, no consent decree or favorable settlement and where "[n]o misconduct was punished or deterred, no lessons taught." *Id.* at 655.

3. Whether a net recovery is required to prevail

A prevailing plaintiff can satisfy the damage recovery element of Chapter 38 without obtaining a net recovery, provided that the zero recovery results from offsetting claims. *McKinley v. Drozd*, 685 S.W.2d 7, 10-11 (Tex. 1985) (party was entitled to attorney's fees for successful breach of contract claim even though damages were offset by opposing party's counterclaim on a separate contract).

However, the "no-net-recovery" exception to the damages recovery element does not apply when the damages awarded by the jury are offset by settlement credits or insurance payment credits. *See Imperial Lofts*, 2007 WL 4157245 at *4. In *Imperial Lofts*, the jury awarded damages to the plaintiff, but because the settlement credits and insurance payment offsets exceeded the jury's damage award, the court held that the plaintiff was not the prevailing party and was not entitled to recover his attorneys' fees. *Id.* at *4-5 (citing *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 806-07 (Tex. App.—Dallas 1988, no writ) ("It is one thing to allow a party an award of attorney fees on a successful claim notwithstanding an opposing party's success on an offsetting claim. It is quite another to allow attorney fees on a claim which, although successful, was paid in full before trial."); *Fire Ins. Exch. v. Sullivan*, 192 S.W.3d 99, 109-10 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (homeowner was not entitled

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