UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

30th Annual Conference on State and Federal Appeals

June 4-5, 2020

Austin, TX

ATTORNEY'S FEES UPDATE

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Full credit and thanks are given to **Anne M. Johnson and Polly Fohn**, who authored "Recent Developments in the Award of Attorneys' Fees" for the 2017 UT Law 27th Annual Conference on State and Federal Appeals. This article borrows in spots from their insightful article, and I appreciate the permission these authors granted for us to do so.

Also, thank you and full credit to my colleagues **Melissa Lorber and Amy Saberian Prueger**. Melissa authored the portion of this article regarding attorney's fees in insurance cases, and Amy authored the article's section on superseding fees.

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I. INTRODUCTION

The most notable attorney's fees decision in recent years is the Texas Supreme Court's *Rohrmoos Venture v. UTSW DVA Healthcare, LLP* opinion, which sought to "clarify the law governing recovery of attorney's fees in Texas courts." 578 S.W.3d 469, 490 (Tex. 2019). The Supreme Court explained that in all cases where attorney's fees are sought from an opponent, a litigant bears the burden of proving two things: (1) that recovery of attorney's fees is legally authorized, and (2) that the requested attorney's fees are reasonable and necessary for the legal representation, so that the award will compensate the prevailing party generally for its losses resulting from the litigation process. *Id.* at 487.

This article provides an overview and an update on recent case law regarding the recovery of attorney's fees in Texas, including in light of the *Rohrmoos* opinion.

II. ATTORNEY'S FEES MUST BE AUTHORIZED BY STATUTE, RULE, OR CONTRACT

In *Rohrmoos*, the Texas Supreme Court explained that attorney's fees must be authorized for a party to recover fees from an opponent. Under the "American Rule," Texas litigants are generally responsible for their own attorney's fees and expenses in litigation. *Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 41 (Tex. 2012). The American Rule provides an exception for circumstances where attorney's fees are authorized by statute or contract. *See Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013); *Epps v. Fowler*, 351 S.W.3d 862, 865 (Tex. 2011). The availability of fees under a particular statute is a question of law for the court. *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, (Tex. App.—Dallas 2020, pet. filed).

Numerous statutes and rules authorize the recovery of attorney's fees. This section focuses on those that frequently arise in civil litigation.

A. Breach of Contract (Chapter 38)

Texas Civil Practice and Remedies Code, Chapter 38 authorizes the recovery of attorney's fees for a breach of contract claim. It provides:

> 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:
>
> - rendered services;
> - performed labor;
> - furnished material;
> - freight or express overcharges;
> - lost or damaged freight or express;
> - killed or injured stock;
> - a sworn account; or
> - an oral or written contract.

TEX. CIV. PRAC. & REM. CODE § 38.001. To recover fees under Chapter 38, the claimant must be represented by an attorney, present the claim to the opposing party, and show that payment for the just amount owed was not tendered within 30 days after the claim was presented. *Id.* § 38.002. The chapter also provides that (1) it is presumed that the usual and customary attorney's fees for a claim under the chapter are reasonable, although the presumption can be rebutted, and (2) 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 a proceeding before the court or a jury case in which the amount of attorney's fees is submitted to the court by agreement. *Id.* §§ 38.003, 38.004.

Notably, Chapter 38 imposes a "prevailing party" requirement on the recovery of fees. "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." *Rohrmoos*, 578 S.W.3d at 484 (Tex. 2019) (quoting *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)).

1. Who Can Be Liable for Attorney's Fees under Chapter 38?

Chapter 38 authorizes a person to recover reasonable attorney's fees from an "individual or corporation" in a breach of contract case. One issue that has arisen is whether an entity other than an "individual or corporation" can be liable for attorney's fees under Chapter 38. This issue was first raised in *Fleming & Associates L.L.P. v. Barton*, in which the Houston (Fourteenth) Court of Appeals held that, under its plain language, Chapter 38 authorizes an award of fees only against "an individual or corporation." 425 S.W.3d 560, 574-76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Accordingly, the court concluded that a limited liability partnership was not liable for attorney's fees under Section 38.001. *Id.* at 576.

The reasoning of *Fleming* has been adopted by courts across the state. *See, e.g., First Cash, Ltd. v. JQ-Parkdale, LLC*, 538 S.W.3d 189, 194 (Tex. App.—Corpus Christi 2018, no pet.); *8305 Broadway, Inc. v. J&J Martindale Ventures,* LLC, No. 04-16-00447-CV, 2017 WL 2791322, at *5 (Tex. App.—San Antonio June 28, 2017, no pet.); *CBIF Ltd. P'ship v. TGI Friday's Inc.,* No. 05-15-00157-CV, 2017 WL 1455407, at *25 (Tex. App.—Dallas Apr. 21, 2017, pet. denied); *Choice! Power, L.P. v. Feeley,* 501 S.W.3d 199, 211–12 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452–53 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Exco Operating Co. v. McGee*, No. 12-15-00087-CV, 2016 WL 4379484, at *2 (Tex. App.—Tyler Aug. 17, 2016, no pet.). Courts have only refused to adopt *Fleming* when the argument that Chapter 38 does not authorize the award of fees against a partnership or other non-corporate entity had not been preserved in the trial court. *See Puig v. High Standards Networking & Computer Serv., Inc.*, No. 01–16–00921–CV, 2017 WL 4820171, at *6 (Tex. App.—Houston [1st Dist.] Oct. 26, 2017, no pet.); *Enzo Inv., LP v. White*, 468 S.W.3d 635, 650-51 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Petrohawk Prop., L.P. v. Jones*, 455 S.W.3d 753, 782-83 (Tex. App.—Texarkana 2015, pet. dism'd).

In 2017 and again in 2019, the Legislature considered legislation that would have allowed recovery from a wider variety of entities in breach of contract claims, including partnerships and limited liability companies. These bills were not successful. *See, e.g.*, HB No. 790, 86th Leg., R.S. (2019); H.B. No. 744, 85th Leg., R.S. (2017). Thus, currently, recovery is authorized against individuals and corporations, but not against partnerships and limited liability companies.

2. The Presentment Requirement

Chapter 38 requires a party to present its claim to the opposing party before recovering attorney's fees. TEX. CIV. PRAC. & REM. CODE § 38.002(2). "Presentment" has been interpreted to mean "simply a demand or request for payment or performance." *Gibson v. Cuellar*, 440 S.W.3d 150, 157 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981)). "The purpose of presentment is to allow the opposing party a reasonable opportunity to pay a claim without incurring an obligation for attorney's fees." *Brainard v. Trinity Univ. Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006); *see also Sacks v. Hall*, 481 S.W.3d 238, 250 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

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First appeared as part of the conference materials for the
30th Annual Conference on State and Federal Appeals session
"Attorney's Fees Update"