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Hot Topics in Damages: Commercial and Personal Injury

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Connie specializes in appeals, yet she gets involved in cases from the earliest stages of a dispute. Connie often serves as an appellate member of trial teams to handle legal strategy, motions, the jury charge, and error preservation. She then handles the full array of traditional appellate services once the case reaches an appeal. She has now presented more than 20 appellate arguments and handled dozens of appeals as lead counsel. Connie was elevated to equity partner at Beck Redden in 2013 and has been Board Certified in Civil Appellate Law since 2010.

Connie also frequently writes and speaks on legal topics. She has spoken most frequently on statutory interpretation, preservation of error, and the jury charge. She has also guest lectured at her *alma mater*, The University of Texas School of Law, on preparing for oral argument.

Connie has been recognized as a “Super Lawyer” by *Texas Monthly* (2014-2016), named in “Best Lawyers in America” for appellate practice (2015-2016), and honored as a Benchmark Litigation “Future Star” and “Rising Star.” In 2013, she was named the “Outstanding Young Lawyer of Houston” by the Houston Young Lawyers Association.

In 2013, U.S. Senators John Cornyn and Ted Cruz appointed Connie to their bipartisan Federal Judicial Evaluation Committee (FJEC) to screen and recommend to the Senators nominees for vacancies on the federal bench and in U.S. Attorney offices in Texas. Connie further serves the profession on various boards, and she volunteers her time to the Houston community by serving as Corporate Secretary for the River Oaks Chamber Orchestra.

TABLE OF CONTENTS

I. Statutory Damages Issues	1
1. Supersedeas – Chapter 52	2
2. Damages Act – Chapter 41	5
II. Common-law Damages Issues	8
1. Loss-of-use damages in total destruction cases	8
2. Reasonable certainty standard extended to market value	9
3. Economic loss rule.....	11
III. Procedural Damages Issues	12
1. Pleading damages caps	13
2. Discovery (FRCP 26)	13

RECENT DEVELOPMENTS IN TEXAS DAMAGES LAW

Understanding remedies is essential to a sophisticated practice. This paper looks to recent damages cases and developments that Texas lawyers handling commercial litigation should know, keeping two ideas in mind. One, remedies are highly dependent on each case's facts, so the rationale for the decision is the most important point to absorb. The paper therefore highlights and synthesizes the reasoning of these recent decisions. Two, the paper attempts to be brief, on the theory that it is unnecessary to summarize facts to make the point.

A few examples illustrate why the rationale rather than the holding in a particular case is so important.

True or False?

- Attorneys fees need not be superseded.¹
- Money awarded for compensatory purposes is “damages.”²
- “Civil penalties” are “damages” for purposes of Chapter 41.³

I. Statutory Damages Issues

One of the more striking aspects of the recent Texas Supreme Court cases is the frequency with which the very nature of damages is the subject of debate. This appears to be largely a byproduct of the increasing number of cases subject to one statute or another. Where remedies must be understood in light of particular words chosen by the Legislature, there is more room for interpretation disputes about what remedies the Legislature specifically contemplated.

The supersedeas statute and the Damages Act have both proven to be fertile ground for statutory disputes about remedies.

¹ It depends. Attorney's fees awarded as fees are not subject to the supersedeas statute. Attorney's fees awarded as compensatory damages *are* required to be superseded. *See In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 170 (Tex. 2013).

² It depends. Typically this is true, but disgorgement is a compensatory award that is not “damages.” *See In re Longview Energy Co.*, 464 S.W.3d 353, 361 (Tex. 2015).

³ It depends. Yes, if the civil penalties are sought under the Texas Optometry Act, but the Court suggests it might take this analysis on a statute-by-statute basis. *See Wal-Mart Stores, Inc. v. Forte*, ___ S.W.3d ___ (Tex. May 20, 2016).

1. Supersedeas – Chapter 52

A recent trilogy of cases answered four questions under the supersedeas statute.

Section 52.006 of the Texas Civil Practice and Remedies Code provides:

- (a) [W]hen a judgment is for money, the amount of security must equal the sum of:
 - (1) the amount of compensatory damages awarded in the judgment;
 - (2) interest for the estimated duration of the appeal;
and
 - (3) costs awarded in the judgment.

Question 1: Does “compensatory damages” or “costs” include attorney’s fees?

A: Generally no, but yes if the fees are sought as damages. *See In re Nalle Plastics Family Ltd. P’ship*, 406 S.W.3d 168, 170 (Tex. 2013) (resolving split).

In *Nalle Plastics*, the Texas Supreme Court addressed “whether attorney’s fees should be considered either compensatory damages or costs when calculating supersedeas amounts.” *Id.* The Court announced a general rule: “attorney’s fees incurred in the prosecution or defense of a claim are not compensatory damages [or costs and thus need not be superseded].” *Id.* at 174.

The Court’s reasoning focused on the fact that certain recoveries, such as court costs and interest, may have a compensatory effect and help make a plaintiff whole but nevertheless are distinct from compensatory damages. This is clear from the fact that the Legislature listed costs and interest separately in the statute. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580 (Tex. 2000) (noting that the Court gives effect to all words of a statute and does not treat any language as surplusage). The Court decided that attorney’s fees have never been considered “damages,” and they are more like court costs or interest than “compensatory damages” for purposes of superseding the enforcement of a money judgment. That attorney’s fees are not specifically included therefore means that they are excluded.

But every good rule has an exception. The Court clarified that attorney’s fees can *sometimes* be compensatory damages:

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