

PRESENTED AT

27th Annual Conference on State and Federal Appeals

June 1-2, 2017

Austin, TX

Recent Developments in the Award of Attorneys' Fees

ANNE M. JOHNSON
POLLY FOHN

Anne M. Johnson
Haynes and Boone, LLP
2323 Victory Ave., Suite 700
Dallas, TX 75219
Telephone: (214) 651-5376
Anne.Johnson@haynesboone.com

Polly Fohn
Haynes and Boone, LLP
1221 McKinney St., Suite 2100
Houston, TX 77010-2007
Telephone: (713) 547-2570
Polly.Fohn@haynesboone.com

Anne M. Johnson
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219-7673
Phone:214.651.5376
anne.johnson@haynesboone.com

Anne Johnson has spent her entire career at Haynes and Boone in the Appellate Section. Anne is currently a member of the firm's Board of Directors, and served as Chair of the Litigation Department from 2010 to 2016.

Anne obtained Board Certification in Civil Appellate Law by the Texas Board of Legal Specialization in 2001 after just six years of practice. She has been named a Texas Super Lawyer in appellate law since 2003 and has been included in "Best Lawyers in America" by *US News and World Report* from 2008-2017. Since 2014, Anne has been honored to be named one of the Top 50 Women Lawyers in Texas by Texas Monthly. Anne was named one of the Best Lawyers in Dallas by D Magazine in 2015, 2016 and 2017.

In 2017, Anne's Texas appellate representations include (1) reversal of a jury's \$4 million nuisance verdict and rendition of a take-nothing judgment in *Aruba v. Parr*, a case widely publicized as the first "fracking" trial, (2) reversal and rendition of a take-nothing judgment in *Celanese v. McGlory*, involving a senior executive's claim that he was entitled to substantial restricted stock units upon his termination, and (3) serving as appellate counsel during a multi-week \$100 million personal injury trial that was successfully resolved prior to verdict. Outside of Texas, Anne recently obtained a reversal of a district court's summary judgment in an appeal to the Sixth Circuit Court of Appeals in a case involving antitrust claims under the Sherman Act.

Outside the office, Anne is Chair of the Board of Directors of Family Gateway, a Dallas non-profit agency that serves homeless families. Anne also serves on the boards of the Alcuin School, New Friends New Life, and the Texas Law Alumni Association Executive Committee. She is a Master in the Patrick E. Higginbotham Inn of Court.

Anne was born and raised in England, and maintains dual US/UK citizenship. She graduated with honors from the University of Pennsylvania in 1992 and from the University of Texas School of Law in 1995. Anne and her husband, Nathan Johnson (UT Law '93), have three children: Finn (age 16), Theo (age 14), and Sophie (age 12).

Polly Fohn
HAYNES AND BOONE, LLP
1221 McKinney St., Suite 2100
Houston, TX 77010
(713) 547-2570
polly.fohn@haynesboone.com

Polly Fohn has argued to the Fifth Circuit Court of Appeals and Texas appellate courts and has been involved in appeals of some of the largest jury verdicts in Texas since graduating from Harvard Law School in 2008. She served as a law clerk to Judge R. Lanier Anderson on the Eleventh Circuit Court of Appeals and has spoken on preservation of error at the State Bar of Texas Advanced Personal Injury Course and on summary judgment practice at the State Bar of Texas Advanced Civil Trial Course.

Named a “Rising Star” by Texas Super Lawyers, Thomson Reuters, from 2013-2017, Polly has achieved victories for her clients even when the odds were stacked against them. She persuaded a trial court to render a take-nothing judgment in the face of an adverse multimillion dollar jury verdict and successfully petitioned an en banc court of appeals to reverse a panel decision and render judgment for her client.

Polly has collaborated with trials teams to obtain summary judgment, helped negotiate settlements, and argued jury charges in high stakes litigation.

As an associate editor for The Houston Lawyer magazine, she writes columns on topics ranging from reviews of new legal books to profiles of prominent local lawyers. Polly gives back to her community as a Young Leader of the United Way of Greater Houston.

TABLE OF CONTENTS

TABLE OF CONTENTS i

I. INTRODUCTION 1

II. THE BASICS 1

 A. Pleading for Attorneys’ Fees 1

 1. Specificity 1

 2. Trial by Consent 2

 B. Presenting a Claim for Fees 2

 C. Preserving the Right to a Trial 3

 D. Prevailing Party Requirements 4

 E. Segregation 5

 1. The Basics 5

 2. Separate Factual Theories and Parties 6

 3. Preservation of Error 7

 F. Recovering Fees after a Nonsuit 7

III. STANDARD OF PROOF 7

 A. The *Arthur Andersen* Factors 7

 B. The Reasonableness and Necessity of Fees 8

 1. Expert Testimony 8

 2. Designating an Expert 8

 3. Presumption of Reasonableness 8

 C. The Lodestar Method 9

 1. Specificity 10

 2. Block Billing 10

 3. Billing Records 10

 4. Triggering the Lodestar Method 11

 D. Non-lodestar cases 11

 E. Appellate Fees 12

 F. Remedies for Insufficient Evidence 12

 1. Remand 12

 2. Remittitur 12

 3. Combination 13

IV. BASES FOR THE RECOVERY OF FEES 13

 A. Chapter 38 of the Remedies Code 13

 B. Contract 14

 C. Sanctions 14

 1. Nexus 14

 2. Reasonableness 15

 3. Anti-SLAPP 15

D.	Offer of Settlement	16
E.	Rule 91a: Motion to Dismiss	17
F.	Declaratory Judgments	17
V.	SUMMARY JUDGMENT	19
A.	Seeking Fees	19
B.	Preservation of Error	20
C.	Reserving a Request for Fees	20
D.	Promissory Notes.....	20
VI.	INTEREST ON FEES	20
VII.	SUPERSEDING FEES	21
VIII.	CONCLUSION	21

RECENT DEVELOPMENTS IN THE AWARD OF ATTORNEYS' FEES

I. INTRODUCTION

This article discusses the basics of seeking, and defending against, an award of attorneys' fees in Texas. Each section highlights recent developments in the law and discusses how the appellate courts are currently applying established law to new fact patterns.

II. THE BASICS

"As a general rule, litigants in Texas are responsible for their own attorneys' fees and expenses in litigation." *Ashford Partners, Ltd. v. ECO Res., Inc.*, 401 S.W.3d 35, 41 (Tex. 2012). This principle is known as the "American Rule," under which a party may not recover attorneys' fees unless expressly 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); *Fleming & Assocs., L.L.P. v. Barton*, 425 S.W.3d 560, 574 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

A. Pleading for Attorneys' Fees

The first step in recovering fees is proper pleading. Generally, "the party requesting attorneys' fees must affirmatively plead for them to be eligible for a judgment containing a fee award." *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015).

1. Specificity

In some cases, a general prayer for attorneys' fees may suffice. For example, several Texas courts have held that when a party pleads facts which, if true, entitle him to the relief sought, he need not specifically plead the applicable statute in order to recover attorney's fees under it. *MeadWestvaco Corp. v. Way Serv., Ltd.*, 09-15-00014-CV, 2016 WL 421303, at *9 (Tex. App.—Beaumont Feb. 4, 2016, no pet.); *Town Ctr. Mall, L.P. v. Dyer*, No. 02-14-00268-CV, 2015 WL 5770583, at*7 (Tex. App.—Fort Worth Oct. 1, 2015, no pet.); *Whallon v. City of Houston*, 462 S.W.3d 146, 165 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (quoting *Gibson v. Cuellar*, 440 S.W.3d 150, 156 (Tex. App.—Houston [14th Dist.] 2013, no pet.)); *see also Tull v. Tull*, 159 S.W.3d 758, 762 (Tex. App.—Dallas 2005, no pet.).

In *Whallon*, for example, the court held that a general prayer for attorneys' fees was sufficient where the plaintiff pled the violation of a statute that provided for the recovery of fees. *Id.* The Houston Court based its reasoning in part on the general rule that: "When the

opposing party fails to specially except to a pleaded request for attorneys' fees, the pleading requesting fees will be construed liberally in favor of the pleader." *Whallon*, 462 S.W.3d at 165 (citing *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.)); *see also Thottam v. Joseph*, No. 01-13-00377-CV, 2015 WL 1632454, at *8 (Tex. App.—Houston [1st Dist.] Apr. 9, 2015, no pet. h.) (mem. op.) (holding that an appellant waived a complaint that the opposing party had failed to plead a basis for the recovery of fees because he "never filed special exceptions or otherwise apprised the trial court of his complaint before the judgment was signed"). The lesson here is that, when defending against an award of fees, consider filing special exceptions to determine the specific basis of a fee request.

If you are seeking fees, relying solely on a general prayer for fees is risky because in more complex cases, the courts may require greater specificity. For example, in *Compass Bank v. Nacim*, the El Paso Court of Appeals recently held that a general prayer for fees was insufficient to support a fee award because the prayer had first been included at a time when the plaintiff had not yet pled any facts germane to the contract (and fee provision) that was ultimately at issue. 459 S.W.3d 95, 112-13 (Tex. App.—El Paso 2015, no pet.) This was true although the plaintiff later amended his petition to allege facts related to breach of contract. *Id.*

Unfortunately, including greater specificity also has its downsides. Several courts have held that "when a party pleads a specific ground of recovery of attorney's fees, the party is limited to that ground and cannot recover attorney's fees on another, unpleaded ground." *Shaw v. Lemon*, 427 S.W.3d 536, 540 (Tex. App.—Dallas 2014, pet. denied); *Heritage Gulf Coast Properties, Ltd. v. Sandalwood Apts, Inc.*, 416 S.W.3d 642, 660 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (same); *Peterson Group, Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 61 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) ("a party who pleads for attorney's fees only under Chapter 38 waives its claim for attorney's fees under a contractual provision.").

The Dallas Court of Appeals recently addressed the tension between general and specific pleading of attorneys' fees in *Daugherty v. Highland Capital Mgmt., L.P.*, 05-14-01215-CV, 2016 WL 4446158, at *2 (Tex. App.—Dallas Aug. 22, 2016, no pet.) The plaintiff argued that the defendant was not entitled to recover attorneys' fees under two specific contractual

RECENT DEVELOPMENTS IN THE AWARD OF ATTORNEYS' FEES

provisions because the defendant had plead for fees under Chapter 38. The court of appeals affirmed the award of attorneys' fees, however, on the ground that the plaintiff had fair notice of the contractual provisions that authorized recovery of fees as they were quoted in and attached to the petition. *Id.* at *3-4. Further, the defendant's pleading sought recovery of fees under "any applicable law." *Id.*

The holding in *Daugherty* corroborates the advice of one commentator, which is to both a specific and a general request for fees—such as: "The Plaintiffs seek recovery of their reasonable and necessary attorneys' fees, costs and expenses through trial and all appeals under applicable Texas law, including but not limited to Section 38.001 of the Tex. Civ. Prac. & Rem. Code." See Trey Cox & Edward Dennis, *Recovery of Attorneys' Fees*, State Bar of Texas: Advanced Civil Trial Course (2014).

2. Trial by Consent

Even if it is unpled, a claim for attorneys' fees may be tried by consent. See *Hot-Hed, Inc. v. Safehouse Habitats, Ltd.*, 333 S.W.3d 719, 733 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Richards v. US Bank Nat'l Ass'n*, No. 03-13-00590-CV, 2015 WL 657896, at *3 (Tex. App.—Austin Feb. 11, 2015, no pet.) (mem. op.) (holding that a claim for appellate fees was tried by consent where evidence of such fees was presented without objection).

But trial by consent can be difficult to establish if you pled a specific basis for an award of fees and then try to expand it post-trial. The Dallas Court of Appeals' opinion in *Shaw v. Lemon* illustrates this point. The defendant pled that he was entitled to fees in connection with a counterclaim for breach of contract. 427 S.W.3d 536 (Tex. App.—Dallas 2014, pet. denied). After trial, the defendant argued that he was also entitled to fees under the Texas Theft Liability Act. The defendant claimed that fees had been tried by consent because the plaintiff agreed to submit the issue of fees to the court post-trial. *Id.* at 540-41. The court of appeals disagreed, noting that "there is nothing in the record to show that Lemon consented to try attorney's fees under the Theft Act post-trial." *Id.* at 541 (emphasis in original). At the post-trial hearing, the plaintiff specifically objected to any award based on the Theft Liability Act. *Id.*; see also *Jones v. Frank Kent Motor Co.*, 02-14-00216-CV, 2015 WL 4965798, at *4 (Tex. App.—Fort Worth Aug. 20, 2015) (no notice that plaintiff was seeking attorney's fees under the Theft Act and no trial by consent).

For a more in-depth discussion of trial by consent see "Preservation of Error at Trial," State Bar Summer School (2015) by Christina Crozier and Polly Fohn.¹

B. Presenting a Claim for Fees

Several statutes, most notably Chapter 38 of the Texas Civil Practice and Remedies Code, require that you present your claim to the opposing side.

Although "presentment" is not defined in Chapter 38, it 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). The burden of proof is on the attorney's fees claimant to plead and prove presentment and failure to tender performance. 481 S.W.3d at 250. Generally, presentment is an issue of fact. *Id.*

No particular form of presentment is required – all that is required is that the plaintiff assert its claim to defendant and request compliance. It may be oral or written. See *Panizo v. Young Men's Christian Assoc. of the Greater Houston Area*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ). It does not have to refer to a specific amount of damages or name a specific claim or cause of action. *Partners Lending Auto Group, L.L.C. v. Leedom Fin. Servs., L.L.C.*, 432 Fed. Appx. 291, 296 (5th Cir. 2011); *Sunbeam Envtl. Serv., Inc. v. Texas Workers' Comp. Ins. Facility*, 71 S.W.3d 846, 851 (Tex. App.—Austin 2002, no pet.); *Standard Constructors, Inc. v. Chevron Chem. Co. Inc.*, 101 S.W.3d 619, 627 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

A party seeking fees under Chapter 38 must plead presentment; however, a "claimant is excused from proving presentment if it pleads that all conditions precedent to recovery have been met and the opposing party fails to specifically deny presentment." See Tex. R. Civ. P. 54 (stating that a party is required to prove only those conditions precedent that have specifically

¹<http://www.haynesboone.com/~media/files/attorney%20publications/2014/preservingerrorattrial.ashx>

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Recent Developments in the Award of Attorneys' Fees

Also available as part of the eCourse

[2017 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the
27th Annual Conference on State and Federal Appeals session
"Attorneys' Fees Update"