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Recovery or Denial?
The Latest on Attorneys' Fees

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For a variety of reasons, disputes over attorney's fees appear to be increasing in frequency, complexity, and intensity. While disputes over attorney's fees may seem like the proverbial "tail wagging the dog", many times attorney's fees become a significant proportion of the amount at stake in a dispute or become the gulf or difference between the parties being able to resolve a dispute, which only widens over the lifecycle of a dispute. Texas' practice of having factual disputes over attorney's fees tried before juries (despite the "vanishing jury trial") contributes. Another factor is that Texas has dramatically shifted away from a traditional Anglo-American common law system to more of a code or statutory-based legal system. Attorney's fees disputes even implicate access to justice issues.¹ Apart from the traditional statutory grounds, there are many other specific statutes, and recent changes providing for a state court motions to dismiss practice in the TCPA and Rule 91a where fees are at issue have increased the number of cases in which these issues arise sooner rather than later. These factors have led to attorney's fee issues appearing quite often in appeals. Some which have raised many nuanced legal issues relating to the recovery of attorney's fees.

Regardless of the causes, attorney's fee disputes and opinions on attorney's fees continue to proliferate and 2018 is no exception. Apart from reiterating fundamentals, this paper focuses on non-family law caselaw on attorney's fees in the 2017-2018 period. Despite the trend toward statutes and away from a purer common law system, reviewing recent opinions about fees will also assist in identifying issues in requesting and recovering attorney's fees under our current laws. This paper also highlights some recent opinions, particularly from the Texas Supreme Court. Last year's *In re National Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017) remains on the required reading list. The Texas Supreme Court has had several important opinions released during this period.

The Texas Supreme Court in 2018 reiterated that attorney's fees are neither "costs" nor "damages" generally. *In re Xerox*, 16-0671, 2018 Tex. LEXIS 615 *18 n.66, 2018 WL 3077704 (Tex. June 22, 2018) citing *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 172–76 (Tex. 2013).² The Fifth Circuit has echoed that pronouncement. *Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037–38 (5th Cir. 2014). However, if attorney's fees are a serious issue in a case,³ it may be helpful to think about attorney's fees claims as similar to other damage claims. As with any damage claim that must be proven or defended against, this paper approaches evidentiary and discovery matters that arise in connection with attorney's fees beginning with an assessment of their legal framework and including the state court jury charge.

¹ A thoughtful concurrence has noted that the development of the law governing attorney's fees in Texas may create "unduly formalistic" results, particularly in small or simple cases. *Auz v. Cisneros*, 477 S.W.3d 355 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (Boyce, J., concurring).

² See also *In re Corral-Lerma*, 451 S.W.3d 385 (Tex. 2015) (per curiam) (citing *Nalle Plastics* and refusing to treat mandatory attorney's fees under the Texas Theft Liability Act as compensatory damages for purposes of calculating bond amount under supersedeas statute). The court noted that some attorney's fees qualify as compensatory damages if recovering for fees paid in a prior suit or similar cases. *In re Nalle Plastics*, 406 S.W.3d at 174–75 (citing *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 111 (Tex.2009)); but see *Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 272 (5th Cir. 2014) (litigation costs incurred earlier in litigation against former employee not recoverable as damages or equitable exception); *Stumhoffer v. Perales*, 459 S.W.3d 158, 168 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (property purchaser not entitled by statute to recover fees incurred in prior related lawsuit).

³ Some attorney's fees awards can be quite substantial as some recent cases highlight. See e.g., *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, 4:14-CV-00371, 2018 U.S. Dist. LEXIS 56478 *20-21, 2018 WL 1602460 (E.D. Tex. April 3, 2018) (awarding \$7.1 in attorney's fees for over 13,000 hours of work); *Quantlab Tech., Ltd. v. Godlevsky*, No. 4:09-CV-4039, 2018 U.S. Dist. LEXIS 100399 *, 2018 WL 2932344 (S.D. Tex. June 12, 2018) (awarding over \$3.2 million in fees each for two defendants as well as expert witness fees).

I. GENERAL PRINCIPLES OF RECOVERY OF ATTORNEY'S FEES UNDER TEXAS LAW.

A. American Rule: each side pays its own fees

The general rule in Texas—like in most of the American legal system—is that each party must pay its own attorney's fees and expenses. *Perdue v. Kenny A.*, 559 U.S. 542, 550 (2010). Under the venerable and ubiquitous "American Rule," each party must pay its own attorney's fees absent a specific statutory, contractual, or other legal basis to shift attorney's fees. *In re National Lloyds Ins. Co.*, 532 S.W.3d at 809; *Intercont'l Grp. P'ship v. KB Home Lone Star, L.P.*, 295 S.W.3d 650, 653 (Tex. 2009); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310–11 (Tex. 2006); see also *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010) ("Our basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or a contract provides otherwise.")⁴ A 2018 case interestingly notes that "The American Rule is characterized as such in contrast with the 'English Rule.' See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) ("At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party."). *Severs v. Mira Vista HOA*, No. 02-16-00157-CV, 2018 Tex. App. LEXIS 7439 *38 n. 9 (Tex. App.—Fort Worth Sept. 6, 2018, n.p.h.).

When fee-shifting is authorized, the party seeking to recover those fees bears the burden of establishing the fees are reasonable and necessary. *In re National Lloyds Ins. Co.*, 532 S.W.3d at 809. Fee-shifting statutes are narrowly and strictly construed. *Willacy County Appraisal Dist v. Sebastian Cotton & Grain, Ltd.*, No. 16-0626, 2018 Tex. LEXIS 351 * 48-49 (Tex. Apr. 27, 2018) (finding TEX. TAX CODE § 42.29 did not authorize fee shifting for claims under TEX. TAX CODE 25.25(b) as opposed to §25.25(c) or (d)).

The Texas Supreme Court has been clear that attorney's fees "not properly billed to one's client are also not properly billed to one's adversary under a fee-shifting statute." *City of Laredo v. Montano*, 414 S.W.3d 731, 736 (Tex. 2013) (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 762 (Tex. 2012) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983))). Texas courts conduct a "meaningful" and "important" review of billing records and practices and are particularly skeptical when an attorney treats an opposing client's liability for attorney's fees differently than one's own client. *Montano*, 414 S.W.3d at 736 ("Here, Gonzalez conceded that had he been billing his client he would have itemized his work and provided [detailed] information. A similar effort should be made when an adversary is asked to pay instead of the client."); *El Apple*, 370 S.W.3d at 762; see also *Long v. Griffin*, 442 S.W.3d 253, 255–56 (Tex. 2014) (per curiam). By way of reference, one can think about the Court's case law regarding appellate review of fees similar to that of areas like excluding expert witnesses, punitive damages, and jury charge.

Fee-shifting provisions in statutes are remedial, not punitive. *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 405 (2003). Claims for attorney's fees generally belong to clients, not attorneys. *Peoples Club of Nigeria, USA v. Okpara*, No 14-17-00099-CV, 2018 Tex. App. LEXIS 7708 *21 (Tex. App.—Houston [14th Dist.] Sept. 20, 2018, n.p.h.).

G.C. Dev. Corp. v. Zayas, B-15-129, 2017 U.S. Dist. LEXIS 51891 *4 n.2 (S.D. Tex. March 15, 2017), adopted by 2017 U.S. Dist. LEXIS 51068 (S.D. Tex. Apr. 4, 2017).

The United States Supreme Court has applied a strict construction to a statutory fee provision applicable to professionals—and specifically attorneys—employed by the bankruptcy estate and has limited "fees seeking fees". *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158, 2169 (2015) (noting that "[t]he general practice of the United States is in opposition to forcing one side to pay the other's attorney's fees, and even is that practice is not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute" (internal citations omitted)); but see *Aguayo v. Bassam Odeh, Inc.*, 3:13-CV-2951-B, 2016 U.S. Dist. LEXIS 169702 *40 (N. D. Tex. Dec. 8, 2016) (allowing recovery of fees for litigating attorney's fee claims).

Recovery of attorney's fees is not authorized in most tort claims (e.g., common law fraud) as a legal basis to shift attorney's fees under Texas law. *MBM Fin. Corp. v. The Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009); *Sensible Care Holdings, LLC v. Sens*, 13-16-00422-CV, 2018 Tex. App. LEXIS 706 *15, 2018 WL 549303 (Tex. App.—Corpus Christi-Edinburg Jan. 25, 2018, pet. denied) (emphasis added) ("Attorney's fees are recoverable in breach of contract claims, but not for claims of fraud."); see also *Chapa*, 212 S.W.3d at 304, 310–11; but see *Bennett v. Grant*, 460 S.W.3d 220, 242 (Tex. App.—Austin 2015) (fees incurred in defending oneself from a malicious

⁴ In diversity cases in the Fifth Circuit, Texas law "controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision." *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002). However, federal procedure applies. See e.g., *Xinyang Hualong Minerals Co. v. Delgado*, 4:16-cv-104, 2017 U.S. Dist. LEXIS 119485 *2 (S.D. Tex. July 31, 2017).

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