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## Recovering Appellate Attorney's Fees in State and Federal Court

Leslie Sara Hyman  
Matthew J. McGowan

Author Contact Information:  
Leslie Sara Hyman  
Pulman, Cappuccio & Pullen, LLP  
San Antonio, Texas 78213

[lhyman@pulmanlaw.com](mailto:lhyman@pulmanlaw.com)  
210-892-1601

## RECOVERING APPELLATE ATTORNEY'S FEES

BY: LESLIE SARA HYMAN<sup>1</sup> AND MATTHEW J. MCGOWAN<sup>2</sup>

This paper provides an update on caselaw in federal and state courts applicable to recovery of attorneys' fees on appeal.

### I. RECOVERY OF APPELLATE FEES IN FEDERAL COURTS IN THE FIFTH CIRCUIT

The preferred method for recovery of appellate fees in federal court is far from clear. Federal Rule of Civil Procedure 54, which is applicable in district court, provides that “unless the substantive law requires [attorneys’] fees to be proved at trial as an element of damages,” fees are to be sought by motion, which typically must be filed “no later than 14 days after the entry of judgment.” Fed. R. Civ. P. 54. The rule does not expressly address conditional appellate fees. However, the Advisory Committee Notes for the 1993 Amendments states:

If an appeal on the merits of the case is taken, the court may rule on the claim for fees, may defer its ruling on the motion, or may deny the motion without prejudice, directing under subdivision (d)(2)(B) a new period for filing after the appeal has been resolved. A notice of appeal does not extend the time for filing a fee claim based on the initial judgment, but the court under subdivision (d)(2)(B) may effectively extend the period by permitting claims to be filed after resolution of the appeal.

#### A. Seeking Conditional Appellate Fees from the Trial Court

Notwithstanding the Advisory Committee Notes, at least one federal district court has suggested that it lacks power to award conditional attorneys' fees. In *Primrose Operating Co. v. Nat'l Am. Ins. Co.*, CIV.A. 5:02-CV-101-C, 2003 WL 21662829, at \*7 (N.D. Tex. July 15, 2003), *aff'd in part, rev'd in part and remanded*, 382 F.3d 546 (5th Cir. 2004), the court held that it could not award the requested conditional appellate attorneys' fees because such fees “are certainly not allowed in advance of such services being rendered and before a judicial determination that plaintiffs are the prevailing parties on appeal and that the fees they incurred were reasonable.” The court concluded that any appellate fees should be sought in the Fifth Circuit.

That position is in the minority. “Although courts in the Fifth Circuit sometimes award conditional attorneys' fees,” conditional fees are generally not considered impossible but are nonetheless “typically disfavored.” *In re Dickinson of San Antonio, Inc.*, 5:19-CV-01011-XR, 2020 WL 264976, at \*6 (W.D. Tex. Jan. 16, 2020); *see also Centerpoint Energy Inc. v. Associated Elec. & Gas Ins. Services Ltd.*, CV 09-2107, 2011 WL 13134747, at \*4 (S.D. Tex. Sept. 9, 2011)

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<sup>1</sup> Partner, PULMAN, CAPPUCCIO & PULLEN, LLP, San Antonio, Texas; B.A., Brandeis University; J.D., UC Hastings College of the Law.

<sup>2</sup> Associate, SANTOYO WEHMEYER, P.C., San Antonio, Texas; B.A., Texas Tech University; J.D., Texas A&M University School of Law.

("Federal district courts in this circuit are hesitant to award such [conditional attorneys'] fees, because, typically, the Fifth Circuit will remand the appropriate fee determination once the claim for fees is ripe for adjudication.").

The Fifth Circuit agrees that a district court does not commit reversible error by refusing to award conditional attorneys' fees, at least when that refusal is not expressly with prejudice to refiling on remand. *Penton v. Am. Bankers Ins. Co. of Fla.*, 115 Fed. Appx. 685, 686–87 (5th Cir. 2004) ("A district court's refusal to award appellate attorney's fees before an appeal has even been taken is not error."). For this reason, no appeal or cross appeal is necessary when a district court defers consideration of appellate fees or denies such fees without prejudice. *Id.*

Sometimes the district courts simply award the fees without discussion. *See, e.g., J&J Sports Productions, Inc. v. McLaughlin*, CV H-16-2450, 2017 WL 3235670, at \*4 (S.D. Tex. July 31, 2017); *Joe Hand Promotions, Inc. v. Tin Cup Sports Bar, Inc.*, CIV.A. 11-01929, 2012 WL 2572504, at \*3-4 (S.D. Tex. June 28, 2012); *Webb v. Abbruzzese*, 4:02-CV-5, 2003 WL 21771017, at \*3 (E.D. Tex. Aug. 1, 2003). Conditional appellate fees are most often awarded, however, when they are both properly supported and unopposed. *See, e.g., Q2 Software, Inc. v. Radius Bank*, A-18-CV-00878-RP, 2020 WL 1482591, at \*1 (W.D. Tex. Mar. 27, 2020) ("Unopposed requests for conditional attorneys' fees generally are awarded."); *Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co.*, 3:10-CV-1629-L, 2016 WL 6788057, at \*5 (N.D. Tex. Oct. 28, 2016), report and recommendation adopted, 3:10-CV-1629-L, 2016 WL 6778390 (N.D. Tex. Nov. 16, 2016), *aff'd*, 725 Fed. Appx. 256 (5th Cir. 2018) ("When the fee-opponent does not object or challenge the request for conditional appellate attorneys' fees supported by evidence, it is generally awarded."); *Thatcher v. OakBend Med. Ctr.*, CV H-14-3551, 2016 WL 5848889, at \*9 (S.D. Tex. Oct. 6, 2016) ("Under Local Rule 7.4, the court deems the request unopposed. Thatcher's request for conditional attorneys' fees is thus APPROVED."); *In re Arnette*, 09-38643-BJH-7, 2011 WL 3651294, at \*5 (Bankr. N.D. Tex. Aug. 18, 2011) ("The Court also concludes that the Foundation may recover conditional attorneys' fees of up to \$195,000.00, depending on the extent to which the judgment is appealed. The reasonableness of that overall amount—and of the incremental amounts required at each stage of the post-judgment appeals process—is attested to in the Trowbridge Affidavit, and has not been challenged by Arnette.").

Some federal district courts deny requests for conditional appellate fees "[i]n the interest of judicial economy," and instead offer to consider that request once the fees have been incurred. For example, in *Fid. & Deposit Co. of Maryland v. Rodriguez*, CIV A 3:09-CV-76-KC, 2009 WL 2382979, at \*5 (W.D. Tex. June 10, 2009), the court recognized that it had the power to award "appellate attorneys' fees, provided that they are conditioned upon ultimate success." The court held that the amount of the award would be "speculative at best" and that the chances of an appeal were unlikely. The court therefore concluded that "[i]n the interest of judicial economy, [the court would] will deny the request for conditional appellate fees without prejudice to [the plaintiff] refiling such motion after the fees have, in fact, been incurred." *See also Transverse, LLC v. Iowa Wireless Services, LLC*, A-10-CV-517-LY, 2019 WL 3283217, at \*13 (W.D. Tex. July 22, 2019), report and recommendation adopted as modified, 1:10-CV-517-LY, 2019 WL 6048004 (W.D. Tex. Sept. 10, 2019), *aff'd in part, rev'd in part and remanded sub nom. Transverse, L.L.C. v. Iowa Wireless Services, L.L.C.*, 992 F.3d 336 (5th Cir. 2021) ("The Court finds it prudent to wait until an appeal has been completed to make a determination on this issue, and declines to award

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