

# Defense Perspective: Attorney's Fees after *Irwin*

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## Attorney's Fees in UIM Cases

### **Pre-*Irwin***

- No recovery since no breach of contract (TCP RC chapter 38);
- No "legal entitlement";
- No recovery since no "presentment"
- Declaratory Judgment no vehicle for recovery of fees (*Jordan*).

### **Post-*Irwin***

- Recovery possible under Texas Declaratory Judgment Act (TCP RC chapter 37);
- Fees must be "**just and equitable**"
- Declaratory Judgment Act is proper vehicle.

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## Defenses under *Irwin*

Pick the proper battlefield.

Is there **federal (diversity) jurisdiction**? Amount in controversy - \$75,000; complete diversity of citizenship.

Reason: **No attorney's fees** in federal declaratory judgment action.  
See page 2 of my article.

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Narrow the issues:  
Stipulate to coverage issues (except legal entitlement).  
Make the case a “car wreck” case.

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## Basis for Recovery (under DJA): “reasonable”

The fees must be “reasonable”.



Question  
of fact



“Not excessive”;  
“Moderate and  
fair”;  
*Arthur Andersen*  
factors.

See page 2 of my article

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## Who is proving up the fee?

Defense perspective: Consider designating **independent expert** to controvert / rebut plaintiff’s testimony re the reasonableness of fee.

- Designating yourself (or your law firm) as comparator in challenging opponent’s fees: **puts your attorney’s fees** in issue.
- **“opens the door to expert witness discovery”**

See page 4-6 of my article (*In re National Lloyds*)

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"Recent Developments in Prosecuting and Defending UM/UIM Actions"