

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.

4

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"