UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

21st Annual Insurance Law Institute

November 10-11, 2016
Houston, TX

ATTORNEYS FEES IN INSURANCE LITIGATION: WHAT WORKS AND WHAT DOESN'T

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Parties litigating insurance coverage and bad faith disputes often must factor in the possibility that attorneys fees may be awarded to one side or the other. Fundamentally, attorneys fees can only be awarded if allowed by statute, rule or by a contract between the parties. Since most insurance policies do not include attorneys fees provisions, statutes are the main source for recovering attorneys fees in Texas insurance coverage and bad faith litigation. The most common statutes for recovering attorneys fees in Texas insurance coverage and bad faith litigation are Tex. Civ. Prac. & Rem. Code §37.001 (for breach of contract); Tex. Civ. Prac. & Rem. Code §38.009 (for state court declaratory judgment actions); Tex. Ins. Code §541.152 (for unfair claims handling practices); and Tex. Ins. Code §542.541 (for breaches of the prompt payment of claims statute). Rules that can give rise to awards of attorneys fees in coverage and bad faith litigation include: Tex. R. Civ. P. 91a (for actions not based in law or in fact); and Fed. R. Civ. P. 37(b)(2)(C) (for federal court discovery sanctions).

The courts are currently churning out opinions on awarding attorneys fees. Beginning in earnest with *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W. 2d 812 (Tex. 1997), the Texas Supreme Court has regularly weighed in on the standards for awarding attorneys fees, leading to significant progeny in the Texas appellate courts. Also, the Texas federal district court Memorandum Orders on attorneys fees are frequently reported on Westlaw and LEXIS, providing a wealth of caselaw and analysis.

I. Standards for Recovering Attorneys' Fees: *Perry Equipment*

The reasonableness of attorneys fees is generally a fact issue. *See Garcia v. Gomez,* 319 S.W.3d 638, 642 (Tex. 2010). Appellate courts review attorney's fee awards for an abuse of discretion. *Ridge Oil Co. v. Guinn Invs., Inc.,* 148 S.W.3d 143, 163 (Tex. 2004). The basic way to calculate an attorneys fees award is the lodestar method. This method begins by multiplying the number of hours worked by a reasonable hourly rate to obtain a lodestar. The lodestar can be adjusted upward or downward depending on the *Perry Equipment* Factors:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- The likelihood … that the acceptance of the particular employment will preclude other employment by the lawyer;
- The fee customarily charged in the locality for similar legal services;
- The amount involved and the results obtained;
- The time limitations imposed by the client or by the circumstances;
- The nature and length of the professional relationship with the client;

- The experience, reputation and ability of the lawyer or lawyers performing the services; and

- Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered

Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

Texas Federal Courts will sometimes utilize the *Perry Equipment* factors and will sometimes utilize what are called the *Johnson* Factors as articulated in *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* Factors are basically the same as the *Perry Equipment* Factors; although one *Johnson* Factor not included in the *Perry Equipment* Factors is fee awards in similar cases. *See generally Mid-Continent Cas. Co. v. Chevron Pipe Line Co.,* 205 F.3d 222, 232 (5th Cir. 2000) ("Because Texas courts engage in a similar analysis, it has *not* been necessary for our court to decide whether the *Johnson* factors control in Texas diversity cases").

While the lodestar method is a very common way to recover fees in insurance coverage and bad faith litigation, law exists that a plaintiff seeking to recover for breach of contract or deceptive practices in an insurance case is not limited to the lodestar method. *See United Nat. Ins. Co. v. AMJ Investments,* 447 S.W.3d 1, 13, 16 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("a plaintiff seeking to recover for breach of contract or deceptive practices in an insurance case is not subject to the [lodestar] requirement," … [h]aving chosen that method, AMJ was required to introduce sufficient evidence to allow the factfinder to apply it.").

II. Standard for Segregating Attorneys' Fees

Although not an insurance case, in 2006 the Texas Supreme Court analyzed how parties should allocate fees attributable to causes of action permitting the recovery of attorneys' fees (e.g. breach of contract) from the fees attributable to causes of action that do not allow for a prevailing party to recover their fees (e.g. negligence). *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). In *Chapa*, the Texas Supreme Court held that when a party incurs attorney's fees relating solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. *Id*. at 313. Intertwined facts do not convert unrecoverable fees to recoverable. *Id*. at 313-14. In other words, just because recoverable and unrecoverable claims depend upon the same set of facts or circumstances, that does not mean those claims require the same research, discovery, proof, or legal expertise. *Id*. at 313.

Therefore, the Court overruled the previous rule in *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1 (Tex. 1991), stating that *Sterling* went too far in suggesting that a common set of underlying facts necessarily made all claims arising therefrom "inseparable" and all legal fees recoverable. *Id*. Here, the Texas Supreme Court held that it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Id*. at 313-14. "But when, as here, it cannot be denied that at least some of

Title search: Attorneys Fees in Insurance Litigation: What Works and What Doesn’t

First appeared as part of the conference materials for the
21st Annual Insurance Law Institute session
"Attorney Fees in Insurance Litigation: What Works and What Doesn’t"