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WHO IS LIABLE FOR ATTORNEY'S FEES UNDER TEXAS CIVIL PRACTICE & REMEDIES CODE SECTION 38.001 IN BREACH OF CONTRACT LITIGATION?

Gregory Scott Crespi*

I. INTRODUCTION

SECTION 38.001 of the Texas Civil Practice & Remedies Code is a broad attorney's fees statute that allows a person to recover reasonable attorney's fees from an "individual or corporation" if "the claim is for: . . . an oral or written contract."¹ This rather terse statute raises a number of issues regarding its scope of application.² In this Article, I will focus on a single, narrow, and practically important question that the statute presents: who qualifies as either an "individual" or a "corporation" who may, under some circumstances, be held liable for the

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1. The full text of that statute reads:

§ 38.001 Recovery of Attorney's Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract.

TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2011).

2. Let me briefly note a few of the legal questions that come to mind when one considers this short statute: Does the fact that the statute states that it applies to claims "for: . . . an oral or written contract," rather than using the seemingly more apt phrase "for the breach of an oral or written contract," have any significance? *See id.* Is one entitled to recover their attorney's fees if one prevails on a breach of contract claim but is awarded no damages or prevails in a declaratory judgment action? How does the statute apply, if at all, to counterclaims? To what extent, if any, is this provision precluded by later statutes that may exempt certain breach of contract actions from its scope? Does the statute allow a person who successfully defends against a breach of contract suit to also recover their attorney's fees? Does the statute allow recovery of attorney's fees under circumstances where a person is able to establish all of the elements of an oral contract and of its breach, but cannot satisfy an applicable Statute of Frauds; is such a claim "valid?" Does the statute apply to all breach of contract litigation taking place in Texas state courts, or only to those cases where Texas law provides the substantive decision rules? Does it apply in the courts of other states with regard to contracts whose substantive provisions are governed by Texas law? How does it apply, if at all, to federal court litigation taking place in Texas or elsewhere? Does the statute limit the liability of a client for his own attorney's fees if a defendant whom the statute requires to pay attorney's fees cannot make the required payments?

Some of these questions have been addressed to some extent by court decisions and some have not, but I will not address any of the issues noted above in this short Article.

other party's attorney's fees in a breach of contract action?³

Suppose, for example, that the defendant that is found liable in a breach of contract action is a partnership, limited partnership,⁴ limited liability company, Employee Retirement Income Security Act (ERISA) trust fund, or some other kind of non-corporate legal entity. Would such a defendant be regarded as either an "individual" or a "corporation" under the statute who would then potentially be held liable for the prevailing party's attorney's fees? What if the defendant is a non-profit corporation or a municipal or other governmental corporation? Does the statutory term "corporation" include these kinds of legal entities as well as ordinary profit-seeking private corporations?

In Part II of this short Article, I will review some of the relevant legislative commentary accompanying the adoption of section 38.001 and the subsequent case law applying the provision that addresses these questions. In Part III, I will discuss whether the courts have correctly interpreted this statute as to the classes of defendants that it covers and how the Texas Supreme Court, in a proper case, might clarify the scope of application of the statute given its current language. I will also suggest some possible amendments to the statute that could be enacted by the Texas legislature to make its intended scope clearer.

II. JUDICIAL INTERPRETATION OF THE "INDIVIDUAL OR CORPORATION" CLAUSE OF SECTION 38.001

A. THE RELEVANT LEGISLATIVE COMMENTARY ACCOMPANYING THE ADOPTION OF SECTION 38.001

Before considering the case law addressing the scope of section 38.001, it is important to note that prior to its 1986 adoption, the relevant statute in this area was article 2226 of the Texas Revised Civil Statutes.⁵ That prior statute used different language than does section 38.001 to describe

3. Once it has been determined which entities qualify as either an "individual" or a "corporation" for the purposes of this statute, further issues arise as to the status of an entity that qualifies under the statute at the time it entered into the contract at issue but then changes its legal status to that of a non-qualifying entity either after it forms the contract but before it breaches the contract or after breach but prior to the award of a judgment against it. Similar issues arise as to a non-qualifying entity that enters into a contract but then changes its legal status prior to breaching the contract or as to a non-qualifying entity that enters into a contract but then changes its legal status after breaching the contract but before a judgment is entered against it. I will not address these changes of legal status issues presented by the statute in this short Article.

While section 38.001 does not provide for any exceptions from the potential liability of individuals and corporations for attorney's fees, there are some subsequent statutory enactments that may shelter some parties who might otherwise be liable. For example, section 38.006 of the Texas Civil Practice & Remedies Code provides that section 38.001 does not apply to certain insurance contracts. WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 22.20(2)(a)(iii) (2011). A complete discussion of the various statutory exceptions to section 38.001 is outside the scope of this short Article.

4. Or, for that matter, a limited liability partnership or a limited liability limited partnership.

5. *Lake LBJ Mun. Util. Dist. v. Coulson*, 839 S.W.2d 880, 890-91 (Tex. App.—Austin 1992, no writ).

both the parties who may seek to recover their attorney's fees in a breach of contract action and the parties who may be held liable for those fees.⁶ Article 2226 stated that "any person, corporation, partnership, or other legal entity" with a valid contract claim against "a person or corporation" could recover their attorney's fees from the latter party.⁷ Section 38.001 replaced article 2226 in 1986 and substituted the term "person" for the phrase "person, corporation, partnership or other legal entity" in the first part of the statute, and section 38.001 also substituted the term "individual" for the term "person" in the second part of the statute.⁸

Section 38.001 was explicitly intended by the Texas legislature only to recodify the preexisting law in this area and not to introduce any substantive changes.⁹ Section 38.001 did, however, make a couple of changes in wording from the text of article 2226, one of which could easily be interpreted as altering its scope. The revisor's note to section 38.001 to some extent clarifies the legislative intent of these changes, but as I will discuss below, the note leaves some important questions unaddressed.

The recodification of article 2226 by section 38.001 in 1986 appears to have been motivated primarily by the desire to preserve the existing law in light of the adoption of the Texas Code Construction Act the prior year.¹⁰ The revisor's note to section 38.001 first of all notes that the Code Construction Act included in its definition of a "person" a "corporation, partnership or other legal entity." The term "person" is now statutorily defined broadly and unambiguously to be synonymous with the more cumbersome "person, corporation, partnership or other legal entity" phrase of article 2226 as to the class of claimants who would potentially be eligible to recover their attorney's fees under section 38.001.¹¹ The simplifying substitution of the term "person" for the longer phrase was therefore made in the new statute.

More interestingly, however, the revisor's note also made clear the primary reason for the substitution of the term "individual" in the second part of section 38.001 for the prior article 2226 term "person." That term was deliberately changed so as to avoid application of the broad new Code Construction Act definition of "person" noted above as to the parties potentially subject to liability for attorney's fees.¹² The objective here was to statutorily ratify the prior "source law" as to a limitation that

6. *Id.*

7. *Id.*

8. *Base-Seal, Inc. v. Jefferson Cnty.*, 901 S.W.2d 783, 785–86 (Tex. App.—Beaumont 1995, writ denied).

9. "Although the codification of the attorney's-fees statute changed the class subject to recovery of attorney's-fees from 'a person or corporation' to 'an individual or corporation,' the Act codifying the attorney's fees statute was 'intended as a recodification only, and no substantive change in the law' was intended." *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 891 (citing 1985 Tex. Gen. Laws, at 3322).

10. *Base-Seal, Inc.*, 901 S.W.2d at 786.

11. *Id.*

12. TEX. LEGISLATIVE COUNCIL, CIVIL PRACTICE AND REMEDIES CODE: A NONSUBSTANTIVE REVISION OF THE STATUTES RELATING TO CIVIL PROCEDURE AND CIVIL REMEDIES AND LIABILITIES 178 (1984).

had been judicially imposed on the class of entities that had been held liable for attorney's fees as a "person" under the article 2226 case law.¹³ The specific concern expressed in that revisor's note was that if this change in wording to the term "individual" was not made, then the term "person" in the second part of the statute would thereafter have to be construed under the broad and unambiguous Code Construction Act definition to impose potential liability for attorney's fees upon governmental entities, a result that the majority of courts interpreting the term "person" more narrowly under article 2226 prior to the adoption of the Code Construction Act had previously rejected.¹⁴

The revisor's note is somewhat incomplete, however, in that it does not specifically address whether substitution of that narrower term "individual" for "person" in section 38.001 was intended to also preclude the potential liability of non-governmental, non-corporate legal entities such as partnerships, limited liability companies, and ERISA trust funds—entities that would also clearly qualify as "persons" under the broad new Code Construction Act definition.¹⁵ A facially plausible and conventional reading of the new term "individual" to apply only to human beings would exclude such legal entities.¹⁶ However, if the term "individual" was interpreted in this way, section 38.001 would arguably go beyond being a mere recodification of article 2226 and its later judicial interpretations that excluded governmental entities from potential liability. It would then change the substantive law to now also exclude private entities that had previously been at least arguably subject to attorney's fees liability as "persons" under the prior statute, in contradiction of the expressed legislative intent to not make any substantive changes in the law.¹⁷ The proper interpretation of the term "individual" in section 38.001 is thus not immediately apparent, given this tension between the expressed legislative intent and a plain meaning interpretation of its text.

13. *Base-Seal, Inc.*, 901 S.W.2d at 786; see also *Baylor Health Care Sys. v. Nat'l Elevator Indus. Health Benefit Plan*, No. 3:06-CV-1888-P, 2008 U.S. Dist. Lexis 43044, at *8–10 (N.D. Tex. June 2, 2008) (mem. op.). The revisor's note for section 38.001 apparently used the term "source law" to refer to the 1985 case of *Comm'rs Court v. Rodgers*, 691 S.W.2d 753, 757 (Tex. App.—Tyler 1982, no writ), which had held that article 2226 did not authorize recovery of attorney's fees against a county because the term "person" in that statute was intended to refer only to individual human beings, *id.* at 757, and the 1982 case of *City of Austin v. N. Austin State Bank*, 631 S.W.2d 564, 569 (Tex. App.—Austin 1982, no writ), that also held that a city could not be held liable for attorney's fees under article 2226. The drafters of the revisor's note apparently did not regard the ruling in *Wickersham Ford, Inc. v. Orange Cnty.*, 701 S.W.2d 344, 348–49 (Tex. App.—Beaumont 1985, no writ), that held a county was both a "person" and a "corporation" potentially liable for attorney's fees on either term under article 2226, a ruling later heavily criticized in *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 891, and also rejected in *Base-Seal, Inc.*, 901 S.W.2d at 787, as rising to the level of "source law."

14. *City of Austin*, 631 S.W.2d at 568; *Comm'rs Ct.*, 691 S.W.2d at 757; TEX. LEGISLATIVE COUNCIL, *supra* note 12, at 178. But see *Wickersham Ford, Inc.*, 701 S.W.2d at 348–49.

15. See TEX. LEGISLATIVE COUNCIL, *supra* note 12, at 178.

16. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2011).

17. See *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 891.

B. TEXAS SUPREME COURT CASES

The Texas Supreme Court has unfortunately not yet issued any opinions that directly address the scope of the “individual or corporation” phrase of section 38.001. In the 1998 case of *Bohatch v. Butler & Binion*,¹⁸ the court did affirm an award of attorney’s fees that had been granted under section 38.001 against a law firm partnership, but the issue of whether a partnership qualified as an “individual or corporation” under section 38.001 was not presented on appeal in that case.¹⁹ So the opinion provides only very slender and indirect support for regarding whether partnerships qualify as “individuals or corporations” under that statute. The questions presented as to the scope of that phrase have therefore to this point been left for lower court resolution.

C. CASES APPLYING SECTION 38.001 TO GOVERNMENTAL ENTITIES

The courts have been consistent in ruling that governmental entities do not qualify as “individuals or corporations” under section 38.001 and thus cannot be held liable for attorney’s fees in breach of contract actions.²⁰ They have taken that position regardless of whether the breach of contract action arises out of a governmental entity’s performance of governmental functions or instead out of its engaging in proprietary activities.²¹ Let me note that the 1985 ruling in *Wickersham Ford v. Orange County*²² did interpret the predecessor “person or corporation” phrase contained in the second part of article 2226 to hold that a county qualified both as a “person” and as a “corporation.”²³ Since section 38.001 retained the term “corporation” when it substituted the term “individual” for the term “person” in that phrase, the *Wickersham Ford* opinion does provide some support for regarding a governmental entity as qualifying as a “corporation” under section 38.001 and thus still subject to potential attorney’s fees liability under the new statute.²⁴ However, the *Wickersham Ford* opinion has been heavily criticized by later courts,²⁵ and no courts subsequently applying the section 38.001 “individual or corporation” phrase have taken the position that either of these terms apply to governmental bodies. This result is not at all surprising, given the clear legislative intent

18. *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998).

19. *Id.* at 547.

20. *See, e.g.*, *City of Corinth v. NuRock Dev., Inc.*, 293 S.W.3d 360, 370 (Tex. App.—Fort Worth 2009, no pet.); *Texas A & M Univ.-Kingsville v. Lawson*, 127 S.W.3d 866, 874 (Tex. App.—Austin 2004, pet. ref’d); *Base-Seal, Inc. v. Jefferson Cnty.*, 901 S.W.2d 783, 786–87 (Tex. App.—Beaumont 1995, writ denied); *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 891; *Texas v. Bodisch*, 775 S.W.2d 73, 75 (Tex. App.—Austin 1989, writ denied); *City of Terrell v. McFarland*, 766 S.W.2d 809, 813 (Tex. App.—Dallas 1988, writ denied).

21. *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 892; *City of Terrell*, 766 S.W.2d at 813.

22. *Wickersham Ford, Inc. v. Orange Cnty.*, 701 S.W.2d 844, 348–49 (Tex. App.—Beaumont 1985, no writ).

23. *Id.*

24. *Id.*

25. *See Base-Seal, Inc.*, 901 S.W.2d at 787; *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 891–92.

to continue to exclude governmental bodies from potential attorney's fees liability that is shown by the revisor's note to section 38.001 and the other legislative commentary that I have discussed above.²⁶

D. CASES APPLYING SECTION 38.001 TO PARTNERSHIPS

The applicability of section 38.001 with regard to imposing attorney's fees liability on partnerships is unfortunately less clear. The phrase "individual or corporation" on its face would appear to exclude all forms of partnerships, since they are all legal entities rather than individual human beings and are not corporations. However, as noted above, the revisor's note to section 38.001 makes clear that the substitution of the narrower term "individual" for the term "person" in prior article 2226 was specifically intended to ratify the prior case law that excluded governmental entities from potential attorney's fees exposure under the broad Code Construction Act definition of "person," and there is no indication in the revisor's note whether a change in the treatment of partnerships was also intended.²⁷ In addition, as I have noted above, the revisor's note claims that section 38.001 was not intended to make any substantive legal changes, but only to recodify the prior law in light of the newly-adopted broad statutory definition of "person" in the Code Construction Act.²⁸

Given this sparse legislative history, should the term "individual" in section 38.001 be interpreted in the conventional fashion as applying only to human beings, or should it be read more broadly to also include at least some non-governmental legal entities, such as partnerships? The case law on this point is very limited and has not reached a definitive position on the question. There are a few appellate cases upholding the awarding of attorney's fees against either a general partnership²⁹ or a limited partnership,³⁰ including one Texas Supreme Court case,³¹ but none of those cases specifically address the difficult issue of whether a partnership qualifies as an "individual or corporation" under section 38.001. The few appellate courts upholding those awards all appear to take it for granted that partnerships so qualify when neither party to the appeal raises the issue, which seems a rather dubious position for the courts to take without offering an explicit justification given the facially unambiguous statutory "individual or corporation" phrasing that would appear to exclude partnerships. The earlier 1976 case of *Intercity Investment Corp.*

26. TEX. LEGISLATIVE COUNCIL, *supra* note 12, at 178.

27. *See Base-Seal, Inc.*, 901 S.W.2d at 786; TEX. LEGISLATIVE COUNCIL, *supra* note 12, at 178.

28. *See Base-Seal, Inc.*, 901 S.W.2d at 786; TEX. LEGISLATIVE COUNCIL, *supra* note 12, at i, 178.

29. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

30. *Carlyle Real Estate Ltd. P'ship-X v. Liebman*, 782 S.W.2d 230, 233 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Carr v. Austin Forty*, 744 S.W.2d 267, 269, 272 (Tex. App.—Austin 1987, writ denied).

31. *Bohatch*, 977 S.W.2d at 547.

*v. Plowman*³² also awarded attorney's fees against a limited partnership under the predecessor article 2226 statute, but that was done applying the former statute's "person or corporation" language,³³ which was arguably broad enough to include partnerships even prior to the adoption of the inclusive Code Construction Act definition of "person," rather than applying the facially narrower "individual or corporation" section 38.001 phrasing.

In *Ganz v. Lyons Partnership*,³⁴ a federal district court did consider, in some detail, the scope of the "individual or corporation" phrase of section 38.001 with regard to a limited partnership.³⁵ That court rather summarily concluded, primarily on the basis of the *Lake LBJ Municipal Utility District v. Coulson* and *Base-Seal, Inc. v. Jefferson County* opinions (each declining to construe the "individual or corporation" phrase to cover governmental bodies),³⁶ that "the phrase [also] cannot be stretched to include 'partnerships.'"³⁷ The *Ganz* court did not address the possible counterargument, which I have noted above, that section 38.001 was explicitly intended only as a recodification made necessary by the Code Construction Act that would not make any substantive legal changes.³⁸ Nor did the court address the argument that the substitution of the term "individual" for the term "person" by section 38.001 was intended only to ratify the prior article 2226 case law that had excluded governmental bodies from attorney's fee liability, as is indicated by the revisor's note, and not to narrow the application of the statute with regard to the liability of private entities in a manner that would change the substantive result from that reached in the partnership liability cases decided under article 2226, such as *Intercity Investment Company*.³⁹

My conclusion is that one can plausibly offer a simple and powerful plain meaning textual argument, supported by the *Ganz* opinion, that neither general nor limited partnerships⁴⁰ are covered under the "individual or corporation" phrase of section 38.001, and counsel for partnerships should definitely make this argument when their clients are faced with potential attorney's fees liability in contract cases. However, such an argument may not prove successful. A court deciding such a case may conclude from the limited legislative history that the substitution of the term "individual" for "person" by section 38.001 was intended only to continue

32. *Intercity Invs. Co. v. Plowman*, 542 S.W.2d 260, 261, 264 (Tex. App.—Fort Worth 1976, no writ).

33. *Id.*

34. *Ganz v. Lyons P'ship*, 173 F.R.D. 173, 176 (N.D. Tex. 1997).

35. *Id.*

36. *Id.* at 175–76; *Base-Seal, Inc. v. Jefferson Cnty.*, 901 S.W.2d 783, 786–87 (Tex. App.—Beaumont 1995, writ denied); *Lake LBJ Mun. Util. Dist. v. Coulson*, 839 S.W.2d 880, 891 (Tex. App.—Austin 1992, no writ).

37. *Ganz*, 173 F.R.D. at 176.

38. See *Lake LBJ Mun. Util. Dist.*, 839 S.W.2d at 176.

39. *Intercity Invs. Co. v. Plowman*, 542 S.W.2d 260, 264 (Tex. App.—Fort Worth 1976, no writ).

40. Nor, presumably, limited liability partnerships or limited liability limited partnerships.

the practice of exempting governmental bodies from potential liability for attorney's fees and not to change the prior law, as articulated in cases such as *Intercity Investment Company*,⁴¹ to also exempt partnerships or other non-corporate legal entities, and that courts may thereby reject the *Ganz* ruling and hold a partnership liable as an "individual" under section 38.001. Such a ruling could also draw some modest support from those appellate cases noted above that have held that certain partnerships were liable for attorney's fees under section 38.001, presumably also as "individuals" rather than as "corporations" (including one Texas Supreme Court case).⁴² Although, as I have noted, none of those cases addressed this issue on appeal or offered an explicit rationale for this result.

E. CASES APPLYING SECTION 38.001 TO LIMITED LIABILITY COMPANIES

The applicability of section 38.001 with regard to imposing liability for attorney's fees on limited liability companies is similarly unclear. In addition to the conflicting arguments discussed above in the partnership liability context that can be offered regarding the legislative intent of substituting the term "individual" for "person," there is also the additional complicating question that arises from time to time in various legal contexts as to whether the legislature intended that limited liability companies be regarded as "partnerships" or instead as "corporations" for the purpose of the application of various constitutional or statutory frameworks that treat those two kinds of entities differently. Such legal frameworks were often created prior to the development of the limited liability company legal form and consequently do not specifically address the legal status of limited liability companies unless they have been subsequently amended to do so, even though at the time they were adopted they were intended to be exhaustive.⁴³

In other words, even if one concludes that section 38.001 narrows the scope of prior article 2226 so that the statutory provision no longer imposes potential attorney's fees liability on "partnerships," should a limited liability company be regarded as analogous to a partnership and also exempted from potential attorney's fees liability on the basis that it is also neither an "individual" nor a "corporation"? Or should limited liability companies, because of their corporate-like chartering requirements and limited liability characteristics, instead be regarded as "corporations" rather than as partnerships for section 38.001 purposes and thus subjected

41. *Intercity Invs. Co.*, 542 S.W.2d at 264.

42. *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

43. *See, e.g., Meyer v. Okla. Alcoholic Beverage Laws Enforcement Comm'n*, 890 P.2d 1361, 1363-64 (Okla. Civ. App. 1995) (determining whether a limited liability company qualifies as a partnership or instead as a corporation for the purposes of state constitutional liquor license restrictions); *Poore v. Fox Hollow Enters.* No. C.A. 93A-09-005, 194 WL 150872 at *2 (Del. Super. Ct. Mar. 29, 1994) (determining whether a limited liability company qualifies as a partnership or instead as a corporation for pro se representation rights purposes).

to potential attorney's fees liability?⁴⁴

The case law here is again very sparse. In *Apache Corp. v. Dynergy Midstream Services*, the court awarded attorney's fees under section 38.001 against a limited liability company, but in that decision the court once again did not specifically address the scope of the "individual or corporation" phrase nor clarify whether it regarded a limited liability company as an "individual," a "corporation," or both, since those questions were not raised on appeal.⁴⁵

One can again offer a plausible textual argument such as was accepted by the court in *Ganz* in the partnership context that limited liability companies are not covered under the "individual or corporation" phrase of section 38.001. Counsel for limited liability companies faced with potential attorney's fees liability in contract cases should definitely make this argument. As I have discussed above in the partnership context, however, it is possible that a court that considers this argument may nevertheless conclude from the legislative history that the substitution of the term "individual" for "person" was intended only to exempt governmental bodies and not non-corporate private entities from potential liability for attorney's fees, and may thereby reject the *Ganz* ruling and hold a limited liability company to be an "individual" liable under section 38.001. Moreover, even a court that extends *Ganz* to interpret the term "individual" to not include either partnerships or limited liability companies may nevertheless conclude that a limited liability company, because of its many corporation-like characteristics, should be regarded as a "corporation" subject to potential section 38.001 liability for attorney's fees.

F. CASES APPLYING SECTION 38.001 TO ERISA TRUST FUNDS OR TO CERTAIN OTHER PRIVATE ASSOCIATIONS

Finally, section 38.001 and its legislative history leave unclear whether the phrase "individual or corporation" is intended to apply to other legal entities that are neither partnerships, limited liability companies, or for-profit private corporations, such as, for example, ERISA trust funds, nonprofit corporations, or certain other forms of private associations such as insurance trusts. There is only very limited case law addressing these questions. The leading case applying section 38.001 to a legal entity of this general nature is clearly *Baylor Health Care System v. National Elevator Industry Health Benefit Plan*.⁴⁶ That 2008 federal district court case dealt squarely with the question of whether an ERISA trust fund could be held liable for attorney's fees under section 38.001 as an "individual or

44. See, e.g., *Meyer*, 890 P.2d at 1363-64; *Poore*, 1994 WL 150872, at *2.

45. *Apache Corp. v. Dynergy Midstream Servs., Ltd. P'ship.*, 214 S.W.3d 554, 565-66 (Tex. App.—Houston [14th Dist.] 2006, pet. granted), *aff'd in part, rev'd on other grounds in part*, 294 S.W.3d 164 (Tex. 2009).

46. *Baylor Health Care Sys. v. Nat'l Elevator Indus. Health Benefit Plan*, No. 3:06-CV-1888-P, 2005 U.S. Dist. Lexis 43044, at *15-16 (N.D. Tex. June 2, 2008) (mem. op.).

corporation.”⁴⁷ That court concluded that it could not.⁴⁸ It found compelling the reasoning of the *Ganz* opinion, discussed above, that ruled that partnerships were not subject to liability under section 38.001 and extended this reasoning to exclude ERISA trust funds from liability as also not qualifying as either “individuals” or “corporations.”⁴⁹ The *Baylor Health Care System* court recognized that there were several earlier appellate cases that had affirmed rulings that had held various non-corporate legal entities liable under section 38.001,⁵⁰ but the court also noted, as I have discussed above in connection with potential partnership and limited liability company liability under section 38.001, that none of those few cases had specifically addressed the precise issue of the scope of that provision and thus they were not nearly as convincing as was *Ganz*.⁵¹

The *Baylor Health Care System* court also discussed the fact that when the *Ganz* court handed down its ruling, the precise issue of the scope of the “individual or corporation” phrase of section 38.001 with regard to an ERISA trust fund had not yet been addressed by the Texas Supreme Court.⁵² It concluded that as a federal court sitting as a Texas state court under the *Erie* doctrine, it needed to conduct an in-depth inquiry that went beyond the textual construction rationale that it favored and that also considered how the Texas Supreme Court would likely rule on this precise question if it was presented to it.⁵³ The *Baylor Health Care System* court then conducted such an inquiry and concluded that the results supported its application of *Ganz*.⁵⁴ It reasoned that since the plain language of the phrase “individual or corporation” is unambiguous, that phrase would therefore likely be construed by the Texas Supreme Court under their precedents⁵⁵ to preclude any interpretation that would construe it as broadly as the prior judicial interpretation of the term “person” under the prior article 2226,⁵⁶ an interpretation that might well include an ERISA trust fund.

47. *Id.* at *13.

48. *Id.* at *16.

49. *Id.*

50. *Id.* at *10–12 (citing and paraphrasing *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998); *Carlyle Real Estate Ltd. P'ship-X v. Leibman*, 782 S.W.2d 230 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Apache Corp.*, 214 S.W.3d at 566; *Carr v. Austin Forty*, 744 S.W.2d 267, 270 (Tex. App.—Austin 1987, writ denied)).

51. “[N]one of these cases address the issue of the recoverability of statutory attorney’s fees from a defendant under the ‘individual or corporation’ language because the issue was not presented on appeal.” *Baylor Health Care Sys.*, 2008 U.S. Dist. Lexis 43044, at *11.

52. *Id.* at *13. As I have noted, the Texas Supreme Court has yet to address the issue of the scope of the “individual or corporation” phrase of section 38.001 in any of the difficult contexts discussed in this Article as of the date of this Article’s publication.

53. *See id.* at *12–13.

54. *Id.* at *15–16.

55. The *Baylor Health Care System* court cited to *Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190 (Tex. 2007); *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999); and *United Servs. Auto. Ass’n v. Strayhorn*, 124 S.W.3d 722 (Tex. App.—Austin 2003, no pet.) in this analysis of Texas Supreme Court statutory construction jurisprudence.

56. *Baylor Health Care Sys.*, 2008 U.S. Dist. Lexis 43044, at *12.

A second federal court case involving the application of section 38.001 to a trust defendant was *In re Gibbons-Markey*.⁵⁷ In that 2007 case, the plaintiff prevailed on a breach of contract claim against Texas Medical Liability Trust, the plaintiff's insurer, and was awarded attorney's fees under section 38.001.⁵⁸ The defendant trust argued on appeal that it was neither an "individual" nor a "corporation" under that provision, so the attorney's fees award was inappropriate.⁵⁹ The court ruled against the defendant trust on the basis that it had waived that objection to the fees award by failing to raise it at the trial.⁶⁰ The court went on to undercut the logic of this ruling, however, by recognizing that if the statute "simply does not provide for an award of attorney's fees against a trust," then no objection would need to be made at trial by the defendant to prevent such an award.⁶¹ However, as an alternative basis for its ruling upholding the award, the court also noted that even if this objection to the fees award had been raised at trial under Texas law lawsuits against a trust are regarded as also being suits against the trustees of the trust, which in this case were individuals, triggering the operation of section 38.001 to justify the award of attorney's fees.⁶²

Finally, in *Stevens v. Anatolian Shepard Dog Club of America, Inc.*⁶³ the court refused to award attorney's fees under section 38.001 against a non-profit corporation.⁶⁴ That opinion denied recovery on the basis that the successful plaintiff's award was based not on her breach of contract claim but on a different cause of action, so section 38.001 did not apply.⁶⁵ The opinion did not, however, state that an alternative basis for the denial of attorney's fees was the failure of the non-profit corporation defendant to qualify as a "corporation" under section 38.001.⁶⁶ The opinion therefore provides at least slender implicit support for regarding non-profit corporations as potentially subject to attorney's fees awards under that section.

III. ASSESSMENT OF THE SECTION 38.001 SCOPE OF COVERAGE JURISPRUDENCE

I am in full agreement with the courts that have consistently interpreted the "individual or corporation" phrase of section 38.001 to exclude governmental bodies from its scope. This reading is in harmony with the common understanding of those terms and with the expressed legislative

57. *In re Gibbons-Markey*, 246 Fed. App'x 275, 276–77 (5th Cir. 2007).

58. *Id.* at 276.

59. *Id.* at 276–77.

60. *Id.* at 277.

61. *Id.*

62. *Id.* (citing the Texas Supreme Court in *Ray Malooly Trust v. Juhl*, 186 S.W.3d 568, 570 (Tex. 2006)).

63. *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71 (Tex. App.—Houston [14th Dist.] 2007, no writ).

64. *Id.* at 78.

65. *Id.*

66. *See id.*

intent to continue to exclude governmental bodies from potential attorney's fees liability under the section 38.001 recodification of prior article 2226 and with the general judicial repudiation of the *Wickersham Ford* opinion. The law is clear enough here, and no further Supreme Court rulings or legislative action is needed in this regard.

The court opinions addressing whether partnerships, limited liability companies, trusts, or non-profit corporations are subject to potential liability under section 38.001 are much less satisfying. None of the few judicial rulings that deal with these issues address to a meaningful extent the central tension between the facially unambiguous "individual or corporation" phrase, which if interpreted in the usual plain meaning fashion would exclude partnerships, limited liability companies, and trusts that would presumably have been covered by the prior broader article 2226 term "person"⁶⁷ and would also arguably exclude non-profit corporations, and the legislative history of section 38.001 discussed above, which indicates to the contrary that no substantive changes of this sort were intended by the recodification.

In my opinion, this unsatisfactory jurisprudence indicates that either a clarifying Supreme Court ruling or a legislative amendment is called for here. The merits of fee-shifting statutes are obviously a complicated and controversial matter that are addressed at length elsewhere in the literature,⁶⁸ and in this short Article I will not take a position as to whether partnerships, limited liability company, trust, or non-profit corporation defendants should be subject to fee-shifting. I would like to briefly note in passing that if any statutory fee-shifting is to take place, I admit that I personally do not see any compelling reason why non-corporate legal entities should receive preferential treatment as defendants as compared to individuals or for-profit private corporations. However, in this Article I will take no position on the question of the merits of fee-shifting statutes beyond calling for some form of clarification of the scope of section 38.001, one way or the other.

67. See, e.g., *Intercity Inves. Co. v. Plowman*, 542 S.W.2d 260, 264 (Tex. App.—Fort Worth 1976, no writ).

68. See, e.g., Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 722 (2010); Michael D. Johnston, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYU J. PUB. L. 179, 185–92 (2007); Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 319 (2005); David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 584 (2005); W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How it Pays its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 371 (1999); Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 HOUS. L. REV. 1915, 1923 (1994); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569–70 (1993); Mark S. Stein, *Is One-Way Fee Shifting Fairer Than Two-Way Fee Shifting?*, 141 F.R.D. 351, 352 (1992); Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 213–216 (1991); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. J. 651, 651–52 (1982).

One way that this clarification could be obtained would be for the Texas Supreme Court to take on a case that raised the issue of the scope of the “individual or corporation” phrase of section 38.001 in one or another of the contexts that I have discussed above, and then fully address the interpretive issue presented in that factual context, perhaps also including in its opinion some broader dicta providing general guidance as to its view of the proper interpretation of that phrase in the other related contexts in which it has previously arisen or in which the question might arise in the future. A second possibility, of course, would be for the Texas legislature to simply amend section 38.001 to make its intent more clear. If the legislature wishes to hold non-corporate private legal entities such as partnerships, limited liability companies, or trusts liable for attorney’s fees under section 38.001, I would recommend that the “individuals or corporations” phrase be replaced by the clearer phrase “persons, but not including governmental bodies.” If, however, the legislature wishes that those non-corporate private legal entities not be held so liable, I would then recommend that the “individuals or corporations” phrase be replaced by the somewhat more cumbersome but clearer phrase “individuals or corporations, but not including partnerships, limited liability companies, trusts, or other non-corporate legal entities.” The term “corporations” in section 38.001 could also be legislatively amended to either “corporations, including non-profit corporations,” or “corporations, but not including non-profit corporations,” as appropriate to clarify its intended scope with regard to non-profit corporations.⁶⁹

69. H.B. No. 274, introduced in the Texas House of Representatives on March 10, 2011, would have amended section 38.001 to award reasonable attorney’s fees to “[t]he prevailing party with respect to a claim . . . from an individual, corporation, or other legal entity” in a breach of contract action. H.B. 274, 82nd Leg., Reg. Sess. (Tex. 2011) (as introduced Mar. 10, 2011). That amendment would thus have broadened the scope of that provision to clearly subject partnerships, limited liability companies, trusts, and other non-corporate legal entities to potential liability for attorney’s fees. It would also have significantly extended the provision to now also include the right to obtain attorney’s fees for those persons who successfully defend against contracts claims. H.B. 274 was eventually adopted but only after it was amended to remove the proposed changes to section 38.001. H.B. 274, 82nd Leg., Reg. Sess. (Tex. 2011) (as enrolled May 27, 2011).

