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ATTORNEYS' FEES

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Recovering Attorneys' Fees in Texas Business Litigation

TABLE OF CONTENTS

I. BUSINESS LITIGATION STATUTES PROVIDING FOR THE RECOVERY OF ATTORNEYS' FEES	531
A. RECOVERING ATTORNEYS' FEES IN BREACH OF CONTRACT ACTIONS	532
1. <i>Presenting Evidence of a Reasonable Fee</i>	533
2. <i>Presentment</i>	534
B. RECOVERING ATTORNEYS' FEES IN DECLARATORY JUDGMENT ACTIONS	535
C. RECOVERING ATTORNEYS' FEES IN DECEPTIVE TRADE PRACTICES ACTIONS	537
1. <i>Recovery of Attorneys' Fees by a Consumer</i>	537
2. <i>Recovery of Attorneys' Fees by a Defendant</i>	538
D. OTHER STATUTES PERMITTING THE RECOVERY OF ATTORNEYS' FEES.....	539
1. <i>Recovering Attorneys' Fees in Shareholder Derivative Litigation</i>	540
a. <i>Recovery of Attorneys' Fees by a Derivative Plaintiff in a Derivative Action</i>	540
b. <i>Recovery of Attorneys' Fees by a Corporation in a Derivative Action</i>	540
2. <i>Recovering Attorneys' Fees in Connection with the Sale or Issuance of a security</i>	542
a. <i>Article 581-33</i>	542

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b.	Article 581-33-1	542
3.	<i>Recovering Fees in Insurance-Related Cases</i>	542
a.	Recovering Attorneys' Fees for an Insurers' Failure to Promptly Pay Claims	543
b.	Recovering Attorneys' Fees for an Insurer's Unfair Competition and Unfair Practices	544
c.	Recovery of Attorneys' Fees for an Insurer's Unfair Claim Settlement Practices	545
4.	<i>Recovering Fees in Intellectual Property Cases</i>	545
5.	<i>Recovering Fees in Antitrust Cases</i>	546
6.	<i>Recovering Fees to Enforce Covenants Not to Compete</i>	547
E.	RECOVERING FEES FOR DEFENDING AGAINST GROUNDLESS PLEADINGS	548
F.	RECOVERING FEES IN CLASS ACTION CASES	549
a.	Amendments to Texas Rule of Civil Procedure 42	549
b.	The Lodestar Method	551
G.	RECOVERING FEES ON OTHER EQUITABLE GROUNDS	552
II.	REQUIREMENTS FOR THE RECOVERY OF ATTORNEYS' FEES	553
A.	THE ANDERSEN STANDARD	555
B.	APPLYING THE RULES 1.04 FACTORS	555
III.	SEGREGATION OF FEES	557
IV.	RECOVERY OF COSTS AND EXPENSES	559
A.	RECOVERING COSTS	559
B.	NON-RECOVERABLE COSTS	561
V.	CONCLUSION	561

THIS article is intended to provide an updated summary of the relevant Texas law regarding the recovery of legal fees and expenses in business litigation and to highlight the most significant developments in this area of law during the Survey period.¹ Since our last Survey, the Texas Supreme Court discussed the discretion afforded to the trial judge when determining whether fees awarded pursuant to the Declaratory Judgment Act are equitable and just, however, no notable pronouncements involving the recovery of attorneys' fees in Texas have been handed down from our highest state court.² In addition, the Texas Supreme Court adopted new rules concerning the award of attorneys' fees in class action lawsuits which were mandated, in part, by the enactment of Texas Civil Practices and Remedies Code Section 26.003 during the last Survey period.

1. The Survey period runs from October 1, 2003 to September 1, 2004. This article is not intended to analyze all Texas statutes that provide for the recovery of attorneys' fees.

2. *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162-63 (Tex. 2004).

Section one discusses the most common ways to recover legal fees in business litigation cases. Section two analyzes Texas Disciplinary Rule of Professional Conduct 1.04 and case law interpreting the same. Section three addresses issues related to the segregation of fees. Finally, section four discusses the recovery of litigation costs and expenses.

I. BUSINESS LITIGATION STATUTES PROVIDING FOR THE RECOVERY OF ATTORNEYS' FEES

The general rule in Texas is that litigants are not entitled to recover attorneys' fees and expenses from their opponent unless a contractual³ or statutory provision provides otherwise.⁴ However, there are more exceptions to this rule. This first section introduces the statutes most commonly used by litigants to recover legal fees and costs and discusses recent developments (during the Survey period) affecting these statutes.

In Texas, litigants involved in business litigation most commonly use three statutory vehicles to recover attorneys' fees: (1) Chapter 38 of the Civil Practice and Remedies Code (the "Code") (authorizing fees in breach of contract actions), (2) Chapter 37 of the Code (authorizing fees in declaratory judgment actions), and (3) Chapter 17 of the Business and Commerce Code (authorizing fees in actions brought under the Texas Deceptive Trade Practices Act).⁵ Statutes sanctioning the recovery of attorneys' fees in securities, insurance, intellectual property, antitrust law, and covenant not to compete cases also exist under Texas law.⁶ Finally, although the law in this area is unsettled, attorneys' fees can sometimes be recovered on equitable grounds.

3. A contractual provision providing for attorneys' fees "will establish a prima facie case that the stipulated amount is reasonable and recoverable The burden then shifts to the opposing party to plead, prove, and request an issue on an affirmative defense that (1) the contractual amount is unreasonable, and (2) a particular known amount would be reasonable." *O'Kehie v. Harris Leasing Co.*, 80 S.W.3d 316, 319 (Tex. App.—Texarkana 2002, no pet.) (citing *F.R. Hernandez Constr. & Supply Co. v. Nat'l Bank of Commerce*, 578 S.W.2d 675, 677 (Tex. 1979). The parties can adopt a liberal or more rigorous standard for recovering attorneys' fees within their contract. *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 417-18 (Tex. App.—Corpus Christi 2001, pet. denied).

4. See *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999); *Travelers Indem. Co. of Conn. v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996); *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992); *New Amsterdam Cas. Co. v. Tex. Indus., Inc.*, 414 S.W.2d 914, 915 (Tex. 1967); *Turner v. Turner*, 385 S.W.2d 230, 233 (Tex. 1964); *Mundy v. Knutson Constr. Co.*, 294 S.W.2d 371, 373 (Tex. 1956); *Massey v. Columbus State Bank*, 35 S.W.3d 697, 701 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Simmons v. Harris County*, 917 S.W.2d 376, 377 (Tex. App.—Houston [14th Dist.] 1996, writ denied); *State v. Estate of Brown*, 802 S.W.2d 898, 901 (Tex. App.—San Antonio 1991, no writ).

5. Other claims that a business litigator should consider seeking are legal fees in connection with include federal and certain state antitrust, trade regulation, racketeering, intellectual property, and covenant not to compete claims. See *infra* notes 72-156. Similarly, although not specifically addressed in this article, attorneys' fees may be awarded as "costs" pursuant to the Texas Commission on Human Rights Act. TEX. LAB. CODE ANN. § 21.259(a) (Vernon 1997 & Supp. 2005).

6. See *infra* notes 72-156.

A. RECOVERING ATTORNEYS' FEES IN BREACH OF
CONTRACT ACTIONS.

Chapter 38 of the Civil Practice and Remedies Code permits a prevailing party to recover attorneys' fees and costs in a breach of contract case.⁷ To obtain attorneys' fees under Chapter 38, a party must satisfy three requirements: (1) prevail⁸ and recover damages⁹ in its breach of contract action,¹⁰ (2) present evidence of a reasonable¹¹ fee for the services rendered in connection with the prevailing claim, and (3) satisfy the procedural requirements of Section 38.002 regarding presentment.¹² Provided

7. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001-.006 (Vernon 1997 & Supp. 2005). Section 38.001 provides: "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 (Vernon 1997 & Supp. 2005). Chapter 38 does not apply to some contracts issued by insurers. See TEX. CIV. PRAC. & REM. CODE ANN. § 38.006 (Vernon 2004). Also note that a defendant is not entitled to attorneys' fees for successfully defending against a contract claim. *Wilson & Wilson Tax Servs., Inc. v. Mohammed*, 131 S.W.3d 231, 240 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

8. A prevailing party is one who is "vindicated by the trial court's judgment." *Polk v. St. Angelo*, No. 03-01-00356-CV, 2002 WL 1070550, at *3 (Tex. App.—Austin May 31, 2002, pet. denied) (not designated for publication); see also *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 564 (Tex. App.—Texarkana 2003, pet. denied) (A "prevailing party" means the "party in whose favor a judgment is rendered, regardless of the amount of damages awarded.") (citing BLACK'S LAW DICTIONARY 1145 (7th ed. 1999)); *Brown v. Fullenweider*, 135 S.W.3d 340, 347 (Tex. App.—Texarkana 2004, pet. denied) ("Simply stated, the prevailing party is the party vindicated by the judgment rendered.").

9. See *Alma Group, L.L.C. v. Palmer*, 143 S.W.3d 840, 845 (Tex. App.—Corpus Christi 2004, pet. denied) (distinguishing attorneys' fees from damages and stating that plaintiff must first recover damages to be awarded fees); see also *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (holding that due to plaintiff's prior material breach of contract resulting in no damages awarded, plaintiff could not recover attorneys' fees); *Valley Ranch L.P. v. City of Irving*, No. 05-03-01416-CV, 2004 WL 1418470, at *2 (Tex. App.—Dallas June 25, 2004, pet. denied) (court did not abuse its discretion in awarding attorneys' fees where the remedy received was specific performance and not monetary damages); *Ameritech Servs., Inc. v. SCA Promotions, Inc.*, No. 05-03-00247-CV, 2004 WL 237760, at *3 (Tex. App.—Dallas Feb. 10, 2004, no pet.) (including nominal damages award is insufficient to support award of attorneys' fees); *Rasmusson v. LBC PetroUnited, Inc.*, 124 S.W.3d 283, 287 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (specific performance constitutes a valid claim for recovery of attorneys' fees).

10. *Potter v. GMP, L.L.C.*, 141 S.W.3d 698, 705 (Tex. App.—San Antonio 2004, pet. dismissed) (holding that limited liability company's regulations can be properly characterized as contract, thereby permitting recovery of fees under section 38.001 for breach of those regulations). A defendant cannot recover fees under Section 38.001 for defeating a breach of contract claim. See *Rainbow Group, Ltd. v. Johnson*, No. 03-00-00559-CV, 2002 WL 1991141, at *12 (Tex. App.—Austin Aug. 30, 2002, pet. denied). "However, the party requesting fees need not obtain a *net* recovery." *Gereb v. Smith-Jaye*, 70 S.W.3d 272, 273 (Tex. App.—San Antonio 2002, no pet.) (emphasis added).

11. *Cordova v. S.W. Bell Yellow Pages, Inc.*, 148 S.W.3d 441, 446 (Tex. App.—El Paso 2004, no pet. h.) (holding that reasonableness of fees does not include a determination of whether or not the fees were necessary for plaintiff to prevail on the cause of action).

12. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.001-.002 (Vernon 1997 & Supp. 2005); *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624-25 (Tex. App.—Dallas 1987, writ denied). Section 38.002 provides: "(1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed

that a litigant satisfies these requirements, recovery of attorneys' fees under this provision is mandatory.¹³ A trial court has discretion to fix the amount of attorneys' fees, but it does not have the discretion to completely deny attorneys' fees if the requirements of Section 38.001 have been satisfied.¹⁴

Importantly, the Texas Supreme Court extended Section 38.001 to provide for the recovery of attorneys' fees for fraud claims when the fraud arises out of a breach of contract action.¹⁵ Other appellate courts have extended this exception to any "tort" that arises out of a breach of contract.¹⁶

1. Presenting Evidence of a Reasonable Fee

Chapter 38 requires litigants to present evidence regarding the reasonable nature of the fee award.¹⁷ Under section 38.003 of the Civil Practice and Remedies Code, "[i]t is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable."¹⁸ However, the fact that "usual and customary" fees are deemed *per se* reasonable does not mean that the court must award the full amount of fees.¹⁹ At least one court held that the "usual and customary"

must not have been tendered before the expiration of the 30th day after the claim is presented." TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 1997).

13. See *Cotter v. Todd*, No. 04-01-00084-CV, 2002 WL 31253397, at *6 (Tex. App.—San Antonio Oct. 9, 2002, no pet.); *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 23 (Tex. App.—Tyler 2000, pet. denied). *But see* *Tex. A & M Univ.—Kingsville v. Lawson*, 127 S.W.3d 866, 874 (Tex. App.—Austin 2004, pet. filed) (holding that Section 38.001 does not support awarding attorneys' fees against a public university). However, at least one court has held that a plaintiff must have plead attorneys' fees at the trial level to recover fees under Section 38.001. *Hageman/Fritz, Byrne, Head & Harrison, L.L.P. v. Luth*, 150 S.W.3d 617, 628 (Tex. App.—Austin 2004, no pet. h.).

14. *World Help v. Leisure Lifestyles, Inc.*, 977 S.W.2d 662, 683 (Tex. App.—Fort Worth 1998, pet. denied).

15. See *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 31 (Tex. 1990).

16. *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 288 (Tex. App.—Corpus Christi 1992), *aff'd as modified*, 841 S.W.2d 853 (Tex. 1992) (citing *Gill Sav. Ass'n*, 797 S.W.2d at 31; *Wilson v. Ferguson*, 747 S.W.2d 499, 504 (Tex. App.—Tyler 1988, writ denied)).

17. There are eight factors that Texas courts consistently refer to in evaluating the reasonableness of attorneys' fees: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

18. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (Vernon 1997 & Supp. 2005).

19. *Ameritech Servs., Inc. v. SCA Promotions, Inc.*, No. 05-03-00247-CV, 2004 WL 237760, at *3 (Tex. App.—Dallas Feb. 10, 2004, no pet. h.) (finding that court did not abuse its discretion in awarding no attorneys' fees where legal services were shown to be unnecessary when defendant made prior settlement offers exceeding plaintiff's recovery at trial); *see also Bethel v. Butler Drilling Co.*, 635 S.W.2d 834, 841 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

fees determined by the court create a ceiling above which the court cannot award.²⁰ Notwithstanding the ceiling, that court believed that the court has discretion to award an amount below that ceiling.²¹ Moreover, the presumption in favor of the reasonableness of “usual and customary” fees can be rebutted by competent evidence.²²

Texas courts can also take judicial notice of the usual and customary attorneys’ fees and the contents of the case file without receiving any other evidence in a bench trial or in a jury case in which the amount of attorneys’ fees is submitted to the court with the consent of the parties.²³ This means that in such circumstances the court can determine the reasonable amount of attorneys’ fees independent of the work described in the case file and the “usual and customary” fees for a similar claim.²⁴

2. Presentment

Presentment is an often overlooked element necessary to recover attorneys’ fees in a breach of contract action. Section 38.002 requires a litigant seeking attorneys’ fees to “present the claim to the opposing party or to a duly authorized agent of the opposing party.”²⁵ This means that a plaintiff seeking fees under this chapter must both plead²⁶ and prove presentment to recover attorneys’ fees claimed.²⁷ Presentment can be made either before or after suit is filed, but presentment must be at least thirty days before judgment.²⁸ The reasoning behind the presentment requirement is to permit a defendant to pay a claim before incurring attorneys’ fees.²⁹ However, Texas courts accept a wide range of formal and informal methods as sufficient presentment.³⁰ The essential element is that there

20. *Bethel*, 635 S.W.2d at 841.

21. *Id.*

22. *Id.*

23. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1997 & Supp. 2005).

24. *Id.*

25. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002(2) (Vernon 1997 & Supp. 2005).

26. *See Llanes v. Davila*, 133 S.W.3d 635, 641 (Tex. App.—Corpus Christi 2003, pet. denied) (holding that “neither the filing of a suit, nor the allegation of a demand in the pleadings can alone constitute presentment of a claim or a demand that the claim be paid” and refusing to consider demand at mediation because lack of record of such alleged presentment).

27. *VingCard A.S. v. Merrimac Hospitality Sys. Inc.*, 59 S.W.3d 847, 867 (Tex. App.—Fort Worth 2001, pet. denied).

28. *Id.* at 868. The pleadings themselves do not constitute demand. *See Grace v. Duke*, 54 S.W.3d 338, 344 (Tex. App.—Austin 2001, pet. denied) (“[T]he mere filing of a breach of contract suit does not constitute presentment.”).

29. *VingCard*, 59 S.W.3d at 867-68.

30. *See Long Trusts v. Griffin*, 144 S.W.3d 99, 109 (Tex. App.—Texarkana 2004, pet. filed) (finding long history of correspondence and negotiations prior to suit constituted sufficient presentment under section 38.002); *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (holding that oral request to tender full performance under contract, which was refused, sufficient to establish presentment); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981) (holding letter and telephone conversation informing sellers of buyers’ intentions to go through with sale of property met requirements of presentment); *Hudson v. Smith*, 391 S.W.2d 441, 451 (Tex. Civ. App.—Houston 1965, writ ref’d n.r.e.) (prior lawsuit).

is notice given before a judgment.³¹ However, an unreasonably excessive demand is improper and will result in disallowal of fees.³² Further, presentment can be contractually waived.³³

B. RECOVERING ATTORNEYS' FEES IN DECLARATORY JUDGMENT ACTIONS

Section 37.009 of the Declaratory Judgments Act permits the recovery of costs and attorneys' fees in a declaratory judgment action.³⁴ Under Section 37.009, the decision of whether to award attorneys' fees is at the discretion of the trial court.³⁵ Furthermore, even a non-prevailing party can recover fees.³⁶

While the award of attorneys' fees is at the court's discretion, the code imposes certain limits on that discretion.³⁷ First, the fees must be "reasonable and necessary."³⁸ Whether the fees are "reasonable and necessary" are fact questions.³⁹

Second, the recovery of fees must also be "equitable and just."⁴⁰ The question of whether the award of fees is "equitable and just" is an issue to be resolved by the trial court.⁴¹ In a recent decision, *Ridge Oil Co. v.*

31. *VingCard*, 59 S.W.3d at 867-68.

32. *Outdoor Sys., Inc. v. BBE, L.L.C.*, 105 S.W.3d 66, 73 (Tex. App.—Eastland 2003, pet. denied).

33. *Escalante v. Luckie*, 77 S.W.3d 410, 423 (Tex. App.—Eastland 2002, pet. denied).

34. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997 & Supp. 2005).

35. *Id.*; see *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171-72 (Tex. 2004) (upholding trial court's decision to deny fees to both parties where each had "legitimate interests to pursue"); *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998) ("The statute thus affords the trial court a measure of discretion in deciding whether to award attorney fees or not."); *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985) ("[T]he grant or denial of attorney's fees in a declaratory judgment action lies within the discretion of the trial court, and its judgment will not be reversed on appeal absent a clear showing that it abused that discretion.").

36. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996) ("[T]he award of attorney's fees in declaratory judgment actions is clearly within the trial court's discretion and is not dependent on a finding that a party 'substantially prevailed.'"); see also *SAVA Gumarska in Kemijska Industrija D.D. v. Advanced Polymer Sci., Inc.*, 128 S.W.3d 304, 324 (Tex. App.—Dallas 2004, no pet. h.) (holding that an appellate court may remand an attorneys' fees award when reversing a declaratory judgment award, but that it is not required to do so because a nonprevailing party can be awarded fees). *But see Nat'l Cafe Servs., Ltd. v. Podaras*, 148 S.W.3d 194, 198 (Tex. App.—Waco 2004, pet. denied) (stating that while trial court acts within its discretion in awarding fees, the court "bases that exercise of discretion in part on whether a party prevails on the merits"); *McMillan v. Dooley*, 144 S.W.3d 159, 186 (Tex. App.—Eastland 2004, pet. filed) (remanding case where the trial record did not indicate whether award of fees would still be equitable and just in light of reversal on the merits.).

37. *Bocquet*, 972 S.W.2d at 20.

38. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997 & Supp. 2005).

39. *Marion v. Davis*, 106 S.W.3d 860, 868 (Tex. App.—Dallas 2003, pet. denied) ("[Plaintiff] did not request any findings of fact on the attorney's fees issue, and none were filed. Without findings of fact establishing the basis for the trial court's exercise of discretion, we cannot conclude as a matter of law that the court abused its discretion in declining to award attorney's fees.").

40. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997 & Supp. 2005).

41. *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162-63 (Tex. 2004) ("Whether it is 'equitable and just' to award less than the fees found by a jury is not a fact question

Guinn Investments, Inc., the Texas Supreme Court examined the “equitable and just” prong of Section 37.009.⁴² In that case, Ridge Oil Company (“Ridge”) prevailed on its declaratory judgment action and the jury found that Ridge incurred reasonable and necessary attorneys’ fees of \$200,895.82 in preparing the case for trial and would incur an additional \$45,000 in attorneys’ fees on appeal.⁴³ The trial court reduced the award to \$175,000 for trial and \$20,000 for appeal without specifying the basis for the reduction.⁴⁴ On appeal to the Texas Supreme Court, Ridge contended that a trial court’s discretion over the award of attorneys’ fees in a declaratory judgment does not include the discretion to partially reduce a jury’s finding of the amount of reasonable and necessary attorney’s fees.⁴⁵ The Texas Supreme Court disagreed and held that the trial court was within its discretion to award some but not all of the fees stating:

There are times . . . when the trial court determines that equity and justice preclude it from awarding the full amount of fees that the jury found to be reasonable and necessary. In this case, the trial judge necessarily concluded that it would not be equitable and just to award Ridge the full amount of attorney’s fees, but that it would also be inequitable and unjust to award no attorney’s fees even though the court had discretion to do so.⁴⁶

Although the court has discretion to award fees it believes are equitably justified, it cannot do so until it has been factually determined that the fees are “reasonable and necessary.”⁴⁷ The Corpus Christi Court of Appeals, in *VICC Homeowners’ Association v. Los Campeones, Inc.*, stated that it would be an abuse of discretion to award fees prior to determining whether the evidence is factually sufficient to support a finding that the fees are reasonable and necessary.⁴⁸ Further, the court stated that an award of attorneys’ fees must abide by the declaration; thus, only after the trial court declares the parties’ rights under the UDJA should the court address attorneys’ fees.⁴⁹

Finally, fees cannot be awarded when the declaratory judgment claim or counterclaim is the “mirror image” of another asserted claim where “a judicial declaration would add nothing to what would be implicit or ex-

because the determination is not susceptible to direct proof but is rather a matter of fairness in light of all the circumstances.”); *Bocquet*, 972 S.W.2d at 21 (“Matters of equity are addressed to the trial court’s discretion . . . [s]o is the responsibility for just decisions.”)

42. See *Ridge Oil*, 148 S.W.3d at 162-63.

43. *Id.* at 161.

44. *Id.*

45. *Id.* at 162.

46. *Id.*

47. *Bocquet*, 972 S.W.2d at 21 (“Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees.”); *VICC Homeowners’ Ass’n, Inc. v. Los Campeones, Inc.*, 143 S.W.3d 832, 837 (Tex. App.—Corpus Christi 2004, no pet. h.) (holding that where a court has not reviewed evidence on the reasonable and necessary requirement for the award of fees, the award of attorneys’ fees may be an abuse of discretion.).

48. 143 S.W.3d at 857-58.

49. *Id.*

press in a final judgment for the enforceable remedy.”⁵⁰ However, the question often becomes whether the issue is already pending before the court when the request for a declaration is sought—if it is not, fees can be awarded so long as the declaration sought does not closely resemble the plaintiff’s claims.⁵¹ Thus, a litigant should promptly assert a request for a declaratory judgment to preserve the right to recover attorneys’ fees.⁵²

C. RECOVERING ATTORNEYS’ FEES IN DECEPTIVE TRADE PRACTICES ACTIONS

The Texas Deceptive Trade Practices Act (“DTPA”) also permits the recovery of attorneys’ fees. In fact, any consumer who prevails on a DTPA claim “shall” be awarded court costs and attorneys’ fees.⁵³ Conversely, a defendant may recover attorneys’ fees under the DTPA if the court finds that an action was groundless in law or fact, brought in bad faith, or initiated to harass the defendant.⁵⁴ Whether the plaintiff or defendant recovers attorneys’ fees, the fees must be “reasonable and necessary.”⁵⁵

The interpretation of “reasonable” by the Texas courts in context of attorneys’ fees awarded under the DTPA has produced strange results. The Texas Supreme Court held that attorneys’ fees may be reasonable as between the client and attorney for purposes of the standard set forth in Rule 104 of the Texas Disciplinary Rules of Professional Conduct, but unreasonable in the context of an award for attorneys’ fees under the DTPA.⁵⁶ Thus, in the case of a contingent fee contract, a consumer may need to use part of his or her DTPA recovery to compensate his or her attorney for the agreed upon rate of attorneys’ fees, leaving the consumer without full recovery.

1. Recovery of Attorneys’ Fees by a Consumer

As mentioned above, section 17.50(d) of the DTPA provides that a prevailing consumer *shall* be awarded court costs and reasonable and neces-

50. *Gibson v. Fauber*, No. 12-02-00249-CV, 2004 WL 2002560, at *13 (Tex. App.—Tyler Sept. 8, 2004, pet. filed) (quoting *Strayhorn v. Raytheon E-Systems, Inc.*, 101 S.W.3d 558, 572 (Tex. App.—Austin 2003, pet. denied) (holding that it is improper to rely on section 37.009 solely to recover attorney fees where declaratory judgment would be redundant to the other relief sought)); *Bloys v. Wilson*, No. 03-03-00193-CV, 2004 WL 162974, at *12 (Tex. App.—Austin Jan. 29, 2004, pet. denied) (holding attorneys’ fees can be awarded where the declaratory relief sought in a counterclaim is more than a mere denial of claimant’s original claims); see also *Whiteside v. Griffis & Griffis, P.C.*, 902 S.W.2d 739, 746-77 (Tex. App.—Austin 1995, writ denied).

51. See *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990).

52. *Hopkins v. Netterville*, No. 12-00-00339-CV, 2002 WL 59278, at *8 (Tex. App.—Tyler Jan. 16, 2002, pet. denied) (“[A] declaratory judgment action may not be used solely to obtain attorney’s fees that are not otherwise authorized by statute or to settle disputes already pending before a court.”); see also *Gibson*, 2004 WL 2002560, at *13.

53. TEX. BUS. & COMM. CODE ANN. § 17.50(d) (Vernon 2002 & Supp. 2005).

54. *Id.* § 17.50(c).

55. See *supra* notes 41-42.

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

sary attorneys' fees.⁵⁷ Since the award is mandatory, the critical determination is whether the consumer has "prevailed."⁵⁸ The Texas Supreme Court has interpreted the word "prevailed" liberally. The court held, for example, that a consumer prevails if the consumer has been awarded *any* of the remedies authorized under section 17.50(b), even if a net recovery was awarded *against* the consumer.⁵⁹ However, the Dallas Court of Appeals recently held that where the jury does not award the plaintiff any damages from a DTPA claim, such plaintiff is not entitled to recover attorneys' fees.⁶⁰

Given that many suits involve successful and unsuccessful DTPA claims, courts often allocate fees between the claims unless there is a substantial overlap among the claims.⁶¹ Additionally, as with all fee awards, an award should include appropriate amounts for appeals or be reduced if an appeal is not taken.⁶²

2. *Recovery of Attorneys' Fees by a Defendant*

Because the DTPA provides consumers with substantial powers against defendants, the statute could potentially be used to harass or intimidate. To prevent such abuses, the DTPA provides for an award of attorneys' fees to a defendant when the consumer's suit was "groundless in fact or law or brought in bad faith, or brought for the purpose of harassment."⁶³ As with a consumer's recovery of attorneys' fees, if the defendant meets this requirement and satisfies the prevail requirement, the award of attorneys' fees is mandatory.

The existence of bad faith, groundlessness, or harassment is determined by the court, not the jury.⁶⁴ These terms are not defined in the DTPA, but the Texas Supreme Court applied the definition of Rule 13 of the Texas Rules of Civil Procedure to define "groundless" for purposes of the DTPA as a suit with "[n]o basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing

57. TEX. BUS. & COMM. CODE ANN. § 17.50(d) (Vernon 2002 & Supp. 2005).

58. See, e.g., *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002) (denying attorneys' fees for failure to prevail on DTPA claim).

59. *McKinley v. Drozd*, 685 S.W.2d 7, 9 (Tex. 1985).

60. *Blue Star Operating Co. v. Tetra Tech., Inc.*, 119 S.W.3d 916, 922 (Tex. App.—Dallas 2003, pet. denied) (citing *Cooper v. Lyon Fin. Servs., Inc.*, 65 S.W.3d 197, 209 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (stating that where jury found party "engaged in knowing violations of DTPA" but "zero dollars would fairly and reasonably compensate" claimant for damages caused by that conduct, trial court properly denied attorneys' fees)).

61. See *Williamson v. Tucker*, 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). The duty to segregate fees also applies between DTPA claims and other causes of action, such as tort or breach of contract. See also *Chapa v. Tony Gullo Motors I, L.P.*, No. 09-03-568-CV, 2004 WL 1902533, at *9 (Tex. App.—Beaumont Aug. 26, 2004, pet. filed) ("An exception to the duty to segregate arises when the attorney's fees are incurred in connection with claims arising out of the same transaction, and which are so interrelated that their prosecution entails proof of essentially the same facts.").

62. See *Int'l Sec. Life Ins. Co. v. Spray*, 468 S.W.2d 347 (Tex. 1971).

63. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon 2002 & Supp. 2005).

64. *Id.*; *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989).

law.”⁶⁵ “Bad faith,” although not defined in DTPA case law, has been defined in many other contexts as any indicia of improper motive, such as ill will, spite, malice, reckless disregard, or dishonesty.⁶⁶ Finally, “harassment,” although not defined in the DTPA, generally means annoyance, irritation, or disturbance.⁶⁷

Another protection afforded to defendants under the DTPA is the notice requirement of section 17.505, which requires that a consumer give a defendant at least sixty days notice prior to filing suit.⁶⁸ The notice must give reasonable detail of the consumer’s specific complaint and the amount of all forms of damages, expenses, and any attorneys’ fees reasonably incurred by the consumer.⁶⁹ Failure to include attorneys’ fees should not affect the sufficiency of the notice letter but, for purposes of attorneys’ fees, allows for the presumption that none exist and settlement may be made without payment of such fees.⁷⁰

For a defendant, a well-drafted settlement offer letter provides the best opportunity to either recover attorneys’ fees or limit its liability for the consumer’s attorneys’ fees in the event the consumer is ultimately successful. Under section 17.505, if the defendant’s settlement offer was the same, substantially the same, or more than the amount of damages found by the trier of fact, then the consumer’s attorneys’ fees are limited to the amount of reasonable and necessary attorneys’ fees incurred *before* the date and time of the rejected settlement offer.⁷¹ If the defendant’s settlement offer was for the full amount requested by the consumer in the notice, but the consumer rejects the offer, the rejection is evidence that the suit was brought for the purpose of harassment and the defendant may be able to recover its attorneys’ fees from the consumer under Section 17.50(c), even if the cause of action was not groundless.

D. OTHER STATUTES PERMITTING THE RECOVERY OF ATTORNEYS’ FEES

In addition to the more commonly used statutes providing for the recovery of attorneys’ fees, certain other Texas statutes allow for the recovery of attorneys’ fees in securities, insurance, intellectual property, antitrust, and covenant not to compete cases.

65. TEX. BUS. & COMM. CODE ANN. § 17.50(c) (Vernon 2002 & Supp. 2005).

66. See *McDuffie v. Blassingame*, 883 S.W.2d 329, 335 (Tex. App.—Amarillo 1994, writ denied). See generally *Holeman v. Landmark Chevrolet Corp.*, 989 S.W.2d 395 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *Transport Indem. Co. v. Orgain, Bell & Tucker*, 846 S.W.2d 878, 883 (Tex. App.—Beaumont 1993), writ denied, 856 S.W.2d 410 (Tex. 1993) (per curiam); *Zak v. Parks*, 729 S.W.2d 875, 879-80 (Tex. App.—Houston [14th Dist.] 1987, no writ).

67. See BLACK’S LAW DICTIONARY 717 (7th ed. 1990).

68. TEX. BUS. & COMM. CODE ANN. § 17.505(a) (Vernon 2004 & Supp. 2005).

69. *Id.*

70. See generally *Minor v. Aland*, 775 S.W.2d 744 (Tex. App.—Dallas 1989, writ denied); *Silva v. Porowski*, 695 S.W.2d 766, 768 (Tex. App.—El Paso 1985, writ ref’d n.r.e.).

71. TEX. BUS. & COMM. CODE ANN. § 17.505(h) (Vernon 2002 & Supp. 2005).

1. *Recovering Attorneys' Fees in Shareholder Derivative Litigation*

Upon the termination of a shareholder derivative lawsuit, Texas courts are empowered to award expenses incurred by one or both of the parties.⁷² The term "expenses" is expressly defined in the statute to include "the reasonable expenses incurred in the defense of a derivative proceeding, including without limitation: (a) attorney's fees; (b) costs in pursuing an investigation of the matter that was the subject of the derivative proceeding; and (c) expenses for which the domestic or foreign corporation or a corporate defendant may be required to indemnify another person."⁷³ The language of the statute and the limited case law interpreting it make clear that depending on the evidence either one—or all—of the parties can collect attorneys' fees in a derivative action.

a. Recovery of Attorneys' Fees by a Derivative Plaintiff in a Derivative Action

Article 5.14J(1)(a) allows a trial court, in its discretion, to award a prevailing plaintiff legal fees if the proceeding results in a "substantial benefit" to the corporation.⁷⁴ Further, a plaintiff may also recover fees from a corporation under Article 5.14J(1)(c) for specific improper filings by the corporation.⁷⁵

b. Recovery of Attorneys' Fees by a Corporation in a Derivative Action

Article 5.14J(1)(b) allows a Texas court to, in its discretion, require the plaintiff to pay the corporations' expenses if the court finds that the derivative proceeding was "commenced or maintained without reasonable

72. Article 5.14 § J of the Texas Business Corporation Act provides that the court may order:

(a) the domestic or foreign corporation to pay the expenses of the plaintiff incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the domestic or foreign corporation; (b) the plaintiff to pay the expenses of the domestic or foreign corporation or any defendant incurred in investigating and defending the proceeding if it finds that the proceeding was commenced or maintained without reasonable cause or for an improper purpose; or (c) a party to pay the expenses incurred by another party (including the domestic or foreign corporation) because of the filing of a pleading, motion, or other paper, if it finds that the pleading, motion, or other paper (i) was not well grounded in fact after reasonable inquiry, (ii) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, or (iii) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

TEX. BUS. CORP. ACT ANN. art. 5.14, § J(1) (Vernon 2003 & Supp. 2005).

73. *Id.* § J(2).

74. *See id.* § J(1)(a); *Rowe v. Rowe*, 887 S.W.2d 191, 198 (Tex. App.—Fort Worth 1994, writ denied) ("Attorney's fees are only recoverable by a *successful* plaintiff in a shareholder's derivative suit."); *see also* *Bayoud v. Bayoud*, 797 S.W.2d 304, 315 (Tex. App.—Dallas 1990, writ denied).

75. TEX. BUS. CORP. ACT ANN. art. 5.14, § J(1)(c) (Vernon 2003 & Supp. 2005).

cause or for an improper purpose.”⁷⁶

The phrase “without reasonable cause” is not defined in the statute, but the Fourteenth District Court of Appeals in Houston has adopted an objective standard that a plaintiff acts without reasonable cause,

if, at the time he brings suit: (1) plaintiff’s claims in the lawsuit are not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or (2) plaintiff’s allegations in the suit are not well-grounded in fact after reasonable inquiry.⁷⁷

Applying this objective standard, the Houston Court of Appeals found legally and factually sufficient evidence to support a trial court’s finding that certain plaintiffs brought a derivative action without reasonable cause.⁷⁸ Significant for the purposes of this finding was the fact that the only claim with apparent merit was *not* included in the original complaint.⁷⁹ The court found the *original* claims related solely to allegations which the plaintiffs had not tested or properly evaluated.⁸⁰ As a result, the finding of no reasonable cause was upheld as proper.⁸¹

Additionally, the corporation—like the derivative plaintiff in the case of the corporation’s filings—can recover fees from the derivative plaintiff under Article 5.14J(1)(c) for specific improper filings by the derivative plaintiff.⁸² Thus, the statute appears to grant the corporation the right to test all of the pleadings, motions, and other papers filed by the derivative plaintiff to determine if any such filing: “(i) was not well grounded in fact after reasonable inquiry; (ii) was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; or (iii) was interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”⁸³

76. *See id.* § J(1)(b). The previous version of Article 5.14 was somewhat ambiguous with respect to whether the court or the jury should ultimately decide whether the proceeding was brought without reasonable cause. *Econ. Gas, Inc. v. Burke*, No. 14-93-01016-CV, 1996 WL 220903, at *11 (Tex. App.—Houston [14th Dist.] May 2, 1996, writ denied) (concurring and dissenting opinion) (“[T]he statute, by its plain and unambiguous terms, allows ‘a finding’ of reasonable cause to be made by the court or jury.”) However, the 1997 amendments to the statute make clear that the *court*, not the jury, is to make such a determination. *See Campbell v. Walker*, No. 14-96-01425-CV, 2000 WL 19143, at *3-6 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, no pet.) (holding determination to be made by court).

77. *Bass v. Walker*, 99 S.W.3d 877, 885 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

78. *Id.*

79. *Id.* at 885-86.

80. *Id.* at 886.

81. *Id.* at 888.

82. TEX. BUS. CORP. ACT ANN. art. 5.14, § J(1)(c) (Vernon 2003 & Supp. 2005).

83. *Id.*

2. *Recovering Attorneys' Fees in Connection with the Sale or Issuance of a Security*

a. Article 581-33

Article 581-33(A)(2) of the Texas Securities Act ("TSA") creates liability for sellers of securities under certain circumstances.⁸⁴ Similarly, a buyer is liable to the seller under Article 581-33(B) of the TSA when he buys securities "by means of an untrue statement of a material fact or omission to state a material fact,"⁸⁵ and pursuant to both sections of Article 581-33, the injured party *may* be awarded court costs and reasonable and necessary attorneys' fees to the extent the court considers such award "equitable."⁸⁶

b. Article 581-33-1

The TSA also creates liability for the activities of investment advisors and their representatives.⁸⁷ Under Article 581-33-1, investment advisors who engage in fraud or fraudulent practices in rendering their services are liable to the purchaser for damages, including, "to the extent the court considers equitable, court costs and reasonable attorneys' fees."⁸⁸

3. *Recovering Fees in Insurance-Related Cases*

There are three widely-utilized statutes providing for the award of attorneys' fees to insured parties when an insurer is found to have engaged in certain prohibited acts.⁸⁹

84. TEX. REV. CIV. STAT. ANN. art. 581-33(A)(2) (Vernon 1964 & Supp. 2005). In relevant part this section states:

A person who offers or sells a security . . . by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or equity for rescission, or for damages if the buyer no longer owns the security.

85. TEX. REV. CIV. STAT. ANN. art. 581-33(B) (Vernon 1964 & Supp. 2005).

86. *Id.* art. 581-33(D)(7).

87. TEX. REV. CIV. STAT. ANN. art. 581-33-1 (Vernon 1964 & Supp. 2005).

88. *Id.*

89. TEX. INS. CODE ANN. §§ 54.001-454, 542.001-.014, 542.051-.061 (Vernon Supp. 2005). Recovery of attorneys' fees may also be allowed to an insured or insurer for breach of the insurance contract. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997 & Supp. 2005). In Texas, an insurance agreement constitutes a "written contract." *See Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 665 (Tex. 1987). Section 38.006 provides that "[t]his chapter does not apply to a contract issued by an insurer that is subject to the provisions of . . . (4) Article 21.21, Insurance Code, or (5) The Unfair Claim Settlement Practices Act (Article 21.21-2, Insurance Code)." TEX. CIV. PRAC. REM. CODE ANN. § 38.006 (Vernon 1997 & Supp. 2005). However, on certification from the United States Court of Appeals for the Fifth Circuit, the Texas Supreme Court clarified that Texas courts should follow "established and longstanding Texas authority that interprets [S]ection 38.006 to allow recovery of attorney's fees in a successful breach-of-contract action against an insurer unless attorney's fees are otherwise available." *Grapevine Excavation, Inc. v. Md. Lloyds*, 35 S.W.3d 1, 5 (Tex. 2000).

a. Recovering Attorneys' Fees for an Insurers' Failure to Promptly Pay Claims

Sections 542.051 through 542.061 of the Texas Insurance Code establish procedures for the prompt payment of insurance claims and create a private right of action for an insured against an insurer that fails to promptly respond to and pay for claims by insured parties.⁹⁰ The damages recoverable by an insured pursuant to these sections include a discretionary award of "reasonable attorneys' fees."⁹¹

For an insurer to be liable under sections 542.051 through 542.061 for failing to respond to or pay a claim promptly, the insured party must establish three elements: (1) that there is a claim under the insurance policy, (2) that the insurer is liable for the claim, and (3) that the insurer failed to follow one or more sections with respect to the claim.⁹² While Texas courts have held that sections 542.051 through 542.061 should be construed broadly so as to provide the maximum protection for the insured party,⁹³ no recovery is allowed without a clear finding that coverage existed under the underlying policy and that the insurer is liable on the relevant claim.⁹⁴ Further, the statute defines the term "claim" narrowly as "a first party claim made by an insured or a policyholder under an insurance policy . . . that must be paid by the insurer directly to the insured or beneficiary."⁹⁵ Thus, at least explicitly, third party claims—for instance, claims made against an insurer for indemnity against a third party—may *not* be subject to coverage.⁹⁶ Texas appellate courts are split as to whether an insured's defense costs constitute a "first party claim" subject to section 542.051 through 542.061 with at least one court applying the sections to an insured's claim for a defense⁹⁷ and one court refus-

90. TEX. INS. CODE ANN. §§ 542.051-.061 (Vernon Supp. 2005). The Texas Legislature enacted a non-substantive recodification of the insurance code. As a result, former Article 21.55 is recodified as sections 542.051-.061 effective April 1, 2005. See Tex. H.B. 2922, 78th Leg., R.S. (2003) (codified at TEX. INS. CODE. §§ 542.051-.061).

91. TEX. INS. CODE ANN. § 542.060 (Vernon Supp. 2005).

92. See *id.*

93. See *DeLeon v. Lloyd's London, Certain Underwriters*, 259 F.3d 344, 354 (5th Cir. 2001).

94. See *Evergreen Nat'l Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 678-79 (Tex. App.—Austin 2003, no pet.); *Breshears v. State Farm Lloyds*, 155 S.W.3d 340, 344-45 (Tex. App.—Corpus Christi 2004, pet. denied) (refusing to award attorneys' fees where insurance company "complied with the insurance code and provided a reasonable payment within a reasonable time").

95. TEX. INS. CODE ANN. § 542.051 (Vernon Supp. 2005).

96. *But see Ernest Martin, Jr., Article 21.21 and Other Statutory Claims: Staying on Top of New Developments*, available at <http://www.haynesandboone.com> (Mar. 30, 2001). Mr. Martin argues that some claims of an insured party under a commercial general liability policy are actually first party claims that should be covered under former Article 21.21. This view has case support. See, e.g., *Luxury Living, Inc. v. Mid-Continent Cas. Co.*, No. H-02-3166, 2003 WL 22116202, at *20-21 (S.D. Tex. Sept. 10, 2003) ("Mid-Continent has a duty to defend Luxury and to reimburse Luxury for its reasonable defense costs to date in the underlying lawsuit, including statutory penalty under [A]rticle 21.55 of the Texas Insurance Code, along with reasonable attorneys' fees in this action.").

97. See *N. County Mut. Ins. Co. v. Davalos*, 84 S.W.3d 314, 318-19 (Tex. App.—Corpus Christi 2002, pet. granted) (applying former Article 21.55 to an insured's claim for

ing to apply them.⁹⁸

If an insurer wrongfully rejects a claim, the insurer may be liable for statutory damages, including attorneys' fees.⁹⁹ Even in cases involving coverage interpretation questions where "reasonable minds may differ," an insurer runs the risk of incurring statutory penalties and attorneys' fees if the court concludes the claim should not have been rejected.¹⁰⁰

b. Recovering Attorneys' Fees For An Insurer's Unfair Competition and Unfair Practices

Sections 541.001 through 541.454 of the Texas Insurance Code provide for an insured to recover his or her "reasonable and necessary" attorneys' fees, in the discretion of the trial court, if the insurer is found to have engaged in unfair competition and practices, including misleading advertising, unfair settlement of the insured party's claims, or misrepresenting the contents of an insurance policy.¹⁰¹ Several factors are relevant to the determination whether the award of attorneys' fees pursuant to sections 541.001 through 541.454 are reasonable and necessary, one of the most important of which is the amount of damages ultimately awarded.¹⁰²

Conversely, the defendant insurer can recover its reasonable and necessary attorneys' fees in an action brought against it if it shows the action brought "was groundless and brought in bad faith or for the purpose of harassment."¹⁰³ An insurer seeking fees under this section must provide the court with a basis to conclude that the insurer spent time dedicated solely to defending the insured's groundless claim as distinguished from time defending the insured's claims for recovery under the policy.¹⁰⁴

defense), *rev'd on other grounds*, 140 S.W.3d 685 (Tex. 2004). On review, the Texas Supreme Court concluded that the insurer's conduct did not violate the terms of former Article 21.55 and therefore did not address whether the scope of Article 21.55 encompassed an insured's claim for defense. *See N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 691 (Tex. 2004).

98. *See TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 242 (Tex. App.—Dallas 2004, *pet. denied*) (holding that "the legislature did not intend the deadlines and penalties of Article 21.55 to apply to claims for a defense").

99. *E & R Rubalcava Constr., Inc. v. Burlington Ins. Co.*, 148 F. Supp. 2d 746, 750 (N.D. Tex. 2001) (holding that insured party is entitled to attorneys' fees award from insurer under former Article 21.55) (citing *Teate v. Mut. Life Ins. Co. of N.Y.*, 965 F. Supp. 891, 893 (E.D. Tex. 1997)). An insurer's wrongful rejection of a claim may be also considered a delay in payment for the purposes of Article 21.55. *Id.*; *see also Nat'l Am. Ins. Co. v. Columbia Packing Co.*, No. 3-02-CV-0909-BD, 2003 WL 21516586, at *7 (N.D. Tex. Apr. 7, 2003) ("The wrongful rejection of a claim, even if made in good faith, may be considered a delay . . .").

100. *Farmers Ins. Exch. v. Neal* 120 S.W.3d 493, 497 (Tex. App.—Texarkana 2003, *no pet. h.*).

101. TEX. INS. CODE ANN. § 541.151 (Vernon Supp. 2005).

102. *See, e.g., Gill Sav. Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697, 703-04 (Tex. App.—Dallas 1988, *writ denied*) (detailing twelve factors normally used in determining reasonableness of an award of attorneys' fees).

103. TEX. INS. CODE ANN. § 541.153 (Vernon Supp. 2005).

104. *See Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, 309 F. Supp. 2d 851, 860 (N.D. Tex. 2004) *vacated on other grounds*, 398 F.3d 332 (5th Cir. Tex. 2005) (upholding denial of insurer's requests for attorneys' fees under former Article 21.21 because "[n]othing [had] been provided that would allow the court to conclude that any significant

c. Recovery of Attorneys' Fees for an Insurer's Unfair Claim Settlement Practices

Sections 542.001 through 542.014 of the Texas Insurance Code now provide for the recovery of attorneys' fees by an insured if the insurer is found to have engaged in unfair claim settlement practices, such as knowingly making misrepresentations to claimants, failing to investigate claims properly, or failing to settle certain claims properly.¹⁰⁵ As noted by the Texas Supreme Court, former "[A]rticle 21.21 now expressly incorporates the unfair settlement practice defined in [A]rticle 21.21-2,"¹⁰⁶ and establishes liability if the insured shows "(1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it."¹⁰⁷ Further, "[a]lthough Article 21.21-2 does not itself create a private cause of action," the Texas Supreme Court has held "that conduct violating Article 21.21-2 [i]s actionable under Article 21.21."¹⁰⁸

4. Recovering Fees in Intellectual Property Cases

Chapter 16 of the Texas Business and Commerce Code provides for the recovery of attorneys' fees in certain trademark infringement matters.¹⁰⁹ Section 16.25 allows a litigant who believes he will be damaged by the registration of a trademark to bring suit to cancel such registration.¹¹⁰ If the court decides that the losing party in a case arising under this section "should have known his position was without merit, the court *may* award the successful party his reasonable attorneys' fees and charge them as a part of the costs against the losing party."¹¹¹

Similarly, section 16.28 of the Code allows a Texas court to, in its discretion, award attorneys' fees when a party is found to have knowingly made a fraudulent representation when applying for a trademark¹¹² or procured an application or registration by false or fraudulent means.¹¹³

time has been devoted by [the insurer] to defense of [the insured's] [A]rticle 21.21 claims as distinguished from [the insured's] claims for recovery under the policy").

105. TEX. INS. CODE ANN. §§ 542.001-014 (Vernon Supp. 2005) (formerly Article 21.21-2).

106. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 77 S.W.3d 253, 268 (Tex. 2002) (finding no violation of former Article 21.21 because injured third party never made proper settlement demand within policy limits).

107. *Id.* at 255.

108. *Id.* at 258-59.

109. As set forth below, Texas law provides for the recovery of attorney's fees in certain trademark related cases. Reasonable attorneys' fees may also be recoverable in trade secrets cases when the claim arises as a breach of contract, subject to all of the limitations described in Section 38.001. *See Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 606 (Tex. App.—Dallas 1990, no writ).

110. TEX. BUS. & COM. CODE ANN. § 16.25(a) (Vernon 2002 & Supp. 2005).

111. *Id.* § 16.25(d) (emphasis added).

112. *Id.* § 16.28(a).

113. *Id.* § 16.28(b)(1). Federal law also provides for the recovery of attorneys' fees in certain intellectual property matters. *See Trademark Law Revision Act of 1988*, 15 U.S.C.A. § 1117(a) (West 1998); 35 U.S.C.A. § 285 (West 1994).

5. *Recovering Fees in Antitrust Cases*

The Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA") provides for the recovery of attorneys' fees to "[a]ny person or governmental entity" whose "business or property has been injured by reason of any conduct declared unlawful" under the TFEAA.¹¹⁴

The award of "costs of suit, including reasonable attorney's fees" is mandatory under the TFEAA, but a prerequisite to this recovery is an award of *actual damages* under the statute.¹¹⁵ However, the TFEAA expressly provides for the award of attorneys' fees in favor of a party who substantially prevails on the merits of his or her suit for *injunctive relief* under the TFEAA.¹¹⁶ Importantly, section 15.21(a)(2) precludes a party from recovering damages under the TFEAA when a judgment has been obtained under *federal* antitrust law and the state TFEAA action is based upon substantially the same conduct which was the subject of the federal suit.¹¹⁷ The TFEAA also provides for the mandatory award of "reasonable attorney's fee, courts costs and other reasonable expenses of litigation" if an action is found by the court to be groundless, brought in bad faith, or brought for the purpose of harassment.¹¹⁸

114. In relevant part, Section 15.21(a)(1) of the TFEAA provides

Any person or governmental entity, including the State of Texas and any of its political subdivisions or tax-supported institutions, whose business or property has been injured by reason of any conduct declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of this Act may sue any person, other than a municipal corporation, . . . and shall recover actual damages sustained, interest on actual damages . . . and the cost of suit, including a reasonable attorney's fee; provided, however, that if the trier of fact finds that the unlawful conduct was willful or flagrant, it shall increase the recovery to threefold the damages sustained and the cost of suit, including a reasonable attorney's fee

TEX. BUS. & COM. CODE ANN. § 15.21(a)(1) (Vernon 2002 & Supp. 2005). Federal antitrust laws, including the Sherman Act, Clayton Act, and the Robinson-Patman Act, also provide for the award of attorney's fees. See 15 U.S.C.A. § 15 (West 2002).

115. See *Chapman Air Conditioning, Inc. v. Franks*, 732 S.W.2d 737, 743 (Tex. App.—Dallas 1987, no writ); *Perritt Co. v. Mitchell*, 663 S.W.2d 696, 699 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

116. In relevant part, section 15.21(b) of the TFEAA provides

Any person or governmental entity, including the State of Texas and any of its political subdivisions or tax-supported institutions, whose business or property is threatened with injury by reason of anything declared unlawful in Subsection (a), (b), or (c) of Section 15.05 of this Act may sue any person, other than a municipal corporation, . . . to enjoin the unlawful practice temporarily or permanently In any such suit in which the plaintiff substantially prevails on the merits, the plaintiff shall be entitled to recover the cost of suit, including a reasonable attorney's fee based on the fair market value of the attorney services used.

TEX. BUS. & COM. CODE ANN. § 15.21(b) (Vernon 2002 & Supp. 2005).

117. In relevant part, Section 15.21(a)(2) of the TFEAA provides:

Any person or governmental entity who obtains a judgment for damages under 15 U.S.C. § 15 or any other provision of federal law comparable to this subsection may not recover damages in a suit under this subsection based on substantially the same conduct that was the subject of the federal suit.

Id. § 15.21(a)(2).

118. In relevant part, section 15.21(a)(3) of the TFEAA, provides: "On a finding by the court that an action under this section was groundless or brought in bad faith or for the

6. Recovering Fees to Enforce Covenants Not to Compete

Chapter 15 of the Texas Business and Commerce Code also permits, in the discretion of the trial court, the recovery of attorneys' fees incurred by an *employer* in defending an action to enforce a covenant not to compete,¹¹⁹ and permits, also in the discretion of the trial court, an *employee* who has entered into an unreasonable covenant not to compete to recover fees incurred in defending against his or her employer¹²⁰—both recovery provisions fall within the ambit of the Covenant Not to Compete Act.¹²¹

As with the other statutes addressed in this article, there is generally a duty—absent a showing that claims are intertwined—to segregate fees attributable to claims arising under the Covenant Not to Compete Act from those not covered by the Act.¹²² The limited number of cases inter-

purpose of harassment, the court shall award to the defendant or defendants a reasonable attorney's fee, court costs, and other reasonable expenses of litigation." *Id.* § 15.21(a)(3).

119. In relevant part, section 15.51(c) of the code provides:

If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, . . . the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court *may* award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

Id. § 15.51(b).

120. In relevant part, Section 15.51(c) of the Code provides:

If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, *the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.*

Id. § 15.51 (emphasis added); see Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 124 S.W.3d 678, 688-89 (Tex. App.—Austin 2003, pet. granted).

121. TEX. BUS. & COM. CODE ANN. § 15.51 (Vernon 2002 & Supp. 2005).

122. Emergicare Sys. Corp. v. Bourdon, 942 S.W.2d 201, 205 (Tex. App.—Eastland 1997, no writ). In an action involving more than one covenant not to compete where one

preting section 15.51's attorneys' fees provision have strictly construed the statute.¹²³

E. RECOVERING FEES FOR DEFENDING AGAINST GROUNDLESS PLEADINGS

Chapter 10 of the Civil Practice and Remedies Code permits a party to recover attorneys' fees and costs incurred in defending against groundless pleadings.¹²⁴ A pleading is groundless when it (1) is presented for an improper purpose, (2) is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or new law, or (3) contains unsupportable factual contentions.¹²⁵ If a pleading fails to meet any of these three criteria and was filed without proper due diligence, Chapter 10 allows the aggrieved party to file a motion for sanctions and recover all expenses resulting from the subject litigation including attorneys' fees.¹²⁶

Texas Rule of Civil Procedure 13 also allows recovery of attorneys' fees to a party forced to defend against baseless pleadings. Under Rule 13, the moving party must demonstrate that the claims filed were both objectively groundless—either lacking legal or evidentiary support—and that such claims were also brought in bad faith or for the purposes of harass-

covenant is found valid and the other void, the court in *Butts Retail, Inc. v. Diversifoods, Inc.*, 840 S.W.2d 770 (Tex. App.—Beaumont 1992, writ denied) held that remand was necessary to determine what portion of the awarded attorneys' fees were attributable to the enforcement of a valid covenant not to compete and what portion was not recoverable for the enforcement of a covenant found to be void and unenforceable such that segregation could be accomplished. *Id.* at 774-75 (citing *Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 571 (Tex. 1975)); *see also Pelto Oil Co. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583, 588 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Indus. Disposal Supply Co. v. Perryman Bros. Trash Serv., Inc.*, 664 S.W.2d 756, 761 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

123. *See Perez v. Tex. Disposal Sys., Inc.*, 53 S.W.3d 480, 482-83 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 80 S.W.3d 593 (Tex. 2002). The appellate court found that section 15.51's "silence on whether an employer can recover attorney's fees if a covenant not to compete *has been reformed* is significant because of the specificity with which section 15.51 addresses the recovery available to employers and employees in an action to enforce a covenant not to compete," and therefore held that "[i]f the covenant not to compete does not meet the section 15.50 criteria and the trial court reforms the covenant, a court may award an employer injunctive relief only." *Id.* (emphasis added) (citing *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991)). The Texas Supreme Court stated, in the context of addressing an illegal restraint of trade argument, that the Covenant Not to Compete Act's preemption provision "makes clear that the [Texas] Legislature intended the Covenant Not to Compete Act to largely supplant the Texas common law relating to enforcement of covenants not to compete," and thus the strict construction of Section 15.51 in this supplemental opinion is not without precedent. *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994).

124. TEX. CIV. PRAC. & REM. CODE ANN. § 10.001-006 (Vernon 2002 & Supp. 2005).

125. *See id.* § 10.001.

126. *See id.* § 10.002; *see also Income Adm'r Servs., Inc. v. Payne*, No. 03-01-00283-CV, 2002 WL 220038, at *5 (Tex. App.—Austin Feb. 14, 2002, pet. denied) (not designated for publication) (upholding sanctions award under Chapter 10 in the amount of \$165,136.95 representing the reasonable expenses and attorneys' fees incurred by defendants to defend the case through trial).

ment.¹²⁷ If the moving party overcomes the presumption that the claims were brought in good faith,¹²⁸ the court may award an appropriate sanction including attorneys' fees.¹²⁹

F. RECOVERING FEES IN CLASS ACTION CASES

a. Amendments to Texas Rule of Civil Procedure 42

During the Survey period, the Texas Supreme Court adopted several amendments to Texas Rule of Civil Procedure 42 governing class actions.¹³⁰ Newly adopted Texas Rule of Civil Procedure 42(h) specifies the procedure for determining an award of attorneys' fees in class actions:

PROCEDURE FOR DETERMINING ATTORNEY FEES AWARD. In an action certified as a class action, the court may award attorney fees in accordance with subdivision (i) and nontaxable costs authorized by law or by agreement of the parties as follows:

- (1) *Motion for Award of Attorney Fees.* A claim for an award of attorney fees and nontaxable costs must be made by motion, subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) *Objections to Motion.* A class member, or a party from whom payment is sought, may object to the motion.
- (3) *Hearing and Findings.* The court must hold a hearing in open court and must find the facts and state its conclusions of law on the motion. The court must state its findings and conclusions in writing or orally on the record.¹³¹

Because this new rule only provides the court with the ability to award fees "authorized by law or by agreement" it does not appear to create new grounds for an award of attorneys' fees.¹³²

127. TEX. R. CIV. P. 13. To recover attorneys' fees under Chapter 10, the movant does not need to establish that the claims were brought in bad faith or for the purposes of harassment. *See Bug Master Exterminating Serv., Inc. v Abash Exterminating, Inc.*, No. 03-02-00048-CV, 2002 WL 31890819, at *2 (Tex. App.—Austin Dec. 31, 2002, no pet.) (not designated for publication) (holding no showing of bad faith or improper purpose required for sanctions under TEX. CIV. PRAC. & REM. CODE §§ 10.001(2), 10.001(3) (Vernon 2002 & Supp. 2005)).

128. TEX. R. CIV. P. 13 ("Courts shall presume that pleadings, motions, and other papers are filed in good faith."); *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993) (holding "burden is on party moving for sanctions to overcome" presumption of good faith).

129. *Gorman v. Gorman*, 966 S.W.2d 858, 867-68 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (affirming trial court's sanction of attorney's fees under Rule 13).

130. *See* Tex. Sup. Ct. Order dated Oct. 9, 2003 (Misc. Docket No. 03-9160).

131. TEX. R. CIV. P. 42(h).

132. Rule 42(h) substantially mirrors its federal counterpart, Rule 23(h), which provides, in relevant part that "[i]n an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement" of the party. *See* FED. R. CIV. P. 23(h). The 2003 Notes of the Advisory Committee concerning subdivision 23(h) state "[t]his subdivision does not undertake to create new grounds for an award of attorneys fees or nontaxable costs."

Newly adopted Rule 42(i) of the Texas Rules of Civil Procedure *requires* the “lodestar” method be used to calculate attorneys’ fees for class counsel.¹³³ Rule 42(i) provides:

(a) In awarding attorney fees, the court must first determine a lodestar figure by multiplying the number of hours reasonably worked time a reasonable hourly rate. The attorney fees must be in the range of 25% to 400% of the lodestar figure. In making these determinations, the court must consider the factors specified in Rule 1.04(b), Tex. Disciplinary R. Prof. Conduct.¹³⁴

This rule expressly allows Texas courts to use a multiplier to enhance fees awarded to class counsel.¹³⁵ The trial court is limited, however, by a ceiling of four times the lodestar and a floor of twenty-five percent of the lodestar.¹³⁶

Prior to the adoption of this rule and the enactment of section 26.003 of the Texas Civil Practice and Remedies Code, the trial court had discretion to use either the percentage method or the lodestar method in awarding class action fees.¹³⁷ This rule impliedly overrules previous Texas authority that permitted an attorneys’ fee award to class counsel based on the “percentage method.”¹³⁸

133. See TEX. R. CIV. P. 42(i). Rule 42(i) only applies in actions filed after September 1, 2003. TEX. R. CIV. P. 42(j). This amendment to Rule 42 was, in part, mandated by Rule 26.002 of the Texas Civil Practices and Remedies Code, which required the Texas Supreme Court to adopt rules that “comply with the mandatory guidelines established by this chapter.” TEX. CIV. PRAC. & REM. CODE ANN. § 26.002 (Vernon Supp. 2005). Those mandatory guidelines include Rule 26.003, which provides as follows:

(a) If an award of attorney’s fees is available under applicable substantive law, the rules adopted under this chapter must provide that the trial court shall use the Lodestar method to calculate the amount of attorneys’ fees to be awarded class counsel. The rules may give the trial court discretion to increase or decrease the fee award calculated by using the Lodestar method by no more than four times based on specified factors.

(b) Rules adopted under this chapter must provide that in a class action, if any portion of the benefits recovered for the class are in the form of coupons or other noncash common benefits, the attorney’s fees awarded in the action must be in cash and noncash amounts in the same proportion as the recovery for the class.

TEX. CIV. PRAC. & REM. CODE ANN. § 26.003 (Vernon 1997 & Supp. 2005).

134. The factors specified in Texas Disciplinary Rule of Professional Conduct 1.04 are discussed more fully in Section III *infra*.

135. *VingCard A.S. v. Merrimac Hospitality Sys., Inc.*, 59 S.W.3d 847, 870 (Tex. App.—Fort Worth 2001, pet. denied).

136. Also, objectors to a class action settlement “are not ordinarily awarded attorneys’ fees, except where their efforts have conferred benefits on the class members generally, as distinguished from the objectors themselves particular.” *Johnson v. Scott*, 113 S.W.3d 366, 377 (Tex. App.—Beaumont 2003, pet. denied) (quoting *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998)). As the Beaumont Court of Appeals noted, “pursuing a parallel case is not enough to require an award of attorneys’ fees.” *Johnson*, 113 S.W.3d at 377 (holding trial court did not abuse discretion in denying fees to objectors counsel who pursued argument that benefited class as whole).

137. See *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949, 960-61 (Tex. 1996) (“Both the percentage method and the lodestar method have their strengths and weaknesses, depending on the facts of the case.”); *Frost Crushed Stone Co. v. Odell Geer Constr. Co.*, 110 S.W.3d 41, 43-44, 47-48 (Tex. App.—Waco 2002, no pet.).

138. See *Gen. Motors Corp.*, 916 S.W.2d at 960.

An equally significant change in practice is the adoption of Rule 42(i)(b) requiring class counsel to be compensated through cash and non-cash benefits in *equal* proportion to the cash and non-cash benefits received by the class as consideration. It is, of course, extremely rare for counsel to accept non-cash benefits, but quite common for class members to be compensated with some non-cash benefit.¹³⁹

b. The Lodestar Method

The lodestar method calculates attorneys' fees by "multiplying the number of hours expended by the attorneys by an appropriate hourly rate determined by a variety of factors, such as the benefits obtained for the [client], the complexity of the issues involved, the expertise of counsel, the preclusion of other legal work due to the acceptance of the . . . suit, and the hourly rate customarily charged in the region for similar work."¹⁴⁰ The resulting number is called a lodestar, presumably because the number provides a guiding point—or lodestar—in the determination of an appropriate award.¹⁴¹

After the lodestar is calculated, the court *may*, in its discretion, apply a multiplier to determine the ultimate amount of attorneys' fees to be awarded.¹⁴² Multipliers are determined by factors such as the complexity of the case, the skill of the attorney, the amount of recovery, and the contingent nature of the case;¹⁴³ these factors vary from case to case.¹⁴⁴

139. See *Stassi v. Boone*, No. GN200180, 2003 WL 21436995, at *21 (Tex. Dist. Ct. June 6, 2003) (unpublished opinion).

140. *Gen. Motors Corp.*, 916 S.W.2d at 960 (holding that lodestar is determined by multiplying number of hours reasonably spent by an hourly rate court deems reasonable for similarly complex, non-contingent work). Cf. *County of Dallas v. Wiland*, 124 S.W.3d 390, 403 (Tex. App.—Dallas 2003, pet. granted); *Borg-Warner Protective Servs. Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.) (holding the same); *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 647 (Tex. App.—Waco 1993, writ denied) (holding same); *City of Dallas v. Arnett*, 762 S.W.2d 942, 956 (Tex. App.—Dallas 1988, writ denied) (holding the same).

141. See Hon. Scott A. Brister, *Proof of Attorneys' Fees in Texas*, 24 ST. MARY'S L.J. 313, 327 (1993).

142. See *Guity v. C.C.I. Enter., Co.*, 54 S.W.3d 526, 528-29 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (remanding case for evaluation of reasonable fee).

143. See *Arnett*, 762 S.W.2d at 956; *Crouch*, 853 S.W.2d at 647. When determining whether to make an upward or downward adjustment to the lodestar, courts commonly examine twelve factors:

- (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required; (4) the effect on other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the ability of the attorney; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the attorney's relationship with the client; and (12) awards in similar cases.

See *Wiland*, 124 S.W.3d at 403 (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

144. *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412-13 (Tex. App.—El Paso 2002, pet. denied) (affirming a multiplier of 2.0 for a case "involving novel and difficult issues" such that the controlling federal case law made the case "not just an uphill battle, but an exercise in windmill tilling"); see also *Forbush v. J.C. Penney Co.*, 98 F.3d 817, 823

As long as the resulting fee is not unreasonable, the amount of the multiplier is largely determined at the discretion of the trial court, and Rule 43(i) authorizes this lodestar amount to be both *increased* or *decreased*.

G. RECOVERING FEES ON OTHER EQUITABLE GROUNDS

Notwithstanding the general rule in Texas that attorneys' fees are recoverable only if a contractual or statutory provision so permits, equitable principles may allow for the recovery of attorneys' fees if a party is required to prosecute or defend a suit because of the "wrongful act" of its opponent.¹⁴⁵ For example, a party may be able to recover reasonable and necessary attorneys' fees and expenses as damages when the defendant's wrongful conduct forced the plaintiff to prosecute or defend another proceeding.¹⁴⁶ Texas courts have also *equitably* extended section 38.001 (authorizing the recovery of fees in breach of contract actions) to cover certain claims sounding in tort.¹⁴⁷

The common fund doctrine is the most widely recognized exception to the general rule that, absent a statutory or contractual basis for an award of attorneys' fees, each litigant must bear his own attorneys' fees.¹⁴⁸ Under the common fund doctrine, the court may allow reasonable attorneys' fees to a litigant who, at his own expense, maintains a suit that "creates a fund benefiting other parties as well as himself."¹⁴⁹

"The common fund doctrine is based on the principle that those receiving the benefits of the suit should bear their fair share of the ex-

(5th Cir. 1996) (affirming multiplier of 2.0); *In re Terra-Drill P'ships Sec. Litig.*, 733 F. Supp. 1127, 1131 (S.D. Tex. 1990) (applying 2.5 multiplier).

145. See *Massey v. Columbus State Bank*, 35 S.W.3d 697, 701 (Tex. App.—Houston [1st Dist.] 2000, pet. denied); *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 839 (Tex. App.—Eastland 1984, no writ); see also *Brandtjen & Kluge v. Manney*, 238 S.W.2d 609, 611 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.). But see *Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 898-99 (Tex. App.—Dallas 2003, no pet.); *Ed Rachal Found. v. D'Unger*, 117 S.W.3d 348, 357-58 (Tex. App.—Corpus Christi 2003, pet. filed) ("Neither the Texas Supreme Court nor this [court of appeals] has adopted any wrongful-act exception to the general prohibition against recovery of attorneys' fees in a tort claim, as we decline to do so in this case."); *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 834 (Tex. App.—Austin 2002, no pet.); *Martin-Simon v. Womack*, 68 S.W.3d 793, 798 n.2 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). Notably, while several courts of appeal have adopted this exception, the Texas Supreme Court has *not* done so. *Ed Rachal Found.*, 117 S.W.3d at 357-58.

146. See *Lesikar v. Rappeport*, 33 S.W.3d 282, 317 (Tex. App.—Texarkana 2000, pet. denied); see also *Qwest Communications Int'l, Inc. v. AT&T Corp.*, 114 S.W.3d 15, 32-33 (Tex. App.—Austin 2003, pet. filed), *rev'd on other grounds*, 167 S.W.3d 324 (Tex. 2005); *McCall v. Tana Oil & Gas Corp.*, 82 S.W.3d 337, 344 (Tex. App.—Austin 2001), *rev'd on other grounds*, 104 S.W.3d 80 (Tex. 2003).

147. See *Gill Sav. Ass'n v. Chair King, Inc.*, 797 S.W.2d 31, 31 (Tex. 1990); *Tex. Beef Cattle Co. v. Green*, 883 S.W.2d 415, 430 (Tex. App.—Beaumont 1994), *rev'd on other grounds*, 921 S.W.2d 203 (Tex. 1996).

148. *Arnett*, 762 S.W.2d at 954; *Tex. Farmers Ins. Co. v. Seals*, 948 S.W.2d 532, 534 n.1 (Tex. App.—Fort Worth 1997, no writ).

149. *Lancer Corp. v. Murillo*, 909 S.W.2d 122, 126 (Tex. App.—San Antonio 1995, no writ) (citing *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527, 532-37 (1881)); see also *Knebel v. Capital Nat'l Bank*, 518 S.W.2d 795, 799-801 (Tex. 1974).

penses.”¹⁵⁰ Attorneys' fees are allowed as a charge against the fund.¹⁵¹ An attorney's compensation from non-contracting plaintiffs under the common fund doctrine is limited to the reasonable value of the attorney's services benefiting them.¹⁵² As long as the litigant has created a fund for others, it need only establish that others have benefited to seek fees from the fund based on the common fund doctrine.¹⁵³ Because this doctrine sounds in equity, courts have shown a reluctance to apply it as an alternative means of recovering attorneys' fees when recovery of fees is already addressed by statute.¹⁵⁴ The common fund doctrine has generally been utilized in class actions.¹⁵⁵ However, it is not expressly mentioned in the new Rule 42(i).

II. REQUIREMENTS FOR THE RECOVERY OF ATTORNEYS' FEES

Assuming that an attorney has the right—whether by contract, statute, or in equity—to recover attorney's fees, the amount of the fee must be “reasonable.” A fee is unconscionable, and thus, unreasonable, “if a competent lawyer could not form a reasonable belief that the fee is reasonable The reasonableness of any fee depends on the circumstances of the services.”¹⁵⁶ Indeed, an award of attorneys' fees can be larger than a litigants' recovery on its substantive claim and still be “reasonable” in certain circumstances.¹⁵⁷

150. *Arnett*, 762 S.W.2d at 954 (citing *Greenough*, 105 U.S. at 533-34; *Knebel*, 518 S.W.2d at 799).

151. *Id.* at 954-55. *Cf.* *Valle v. State Farm Mut. Auto. Ins. Co.*, 5 S.W.3d 745, 746-47 (Tex. App.—San Antonio 1999, pet. denied).

152. *Arnett*, 762 S.W.2d at 955.

153. *See* *Libhart v. Copeland*, 949 S.W.2d 783, 803-04 (Tex. App.—Waco 1997, no writ); *Camden Fire Ins. Ass'n v. Mo., Ky. & Tenn. Ry. Co. of Tex.*, 175 S.W. 816, 817 (Tex. Civ. App.—Dallas 1915, no writ).

154. *Schindler v. Schindler*, 119 S.W.3d 923, 933 (Tex. App.—Dallas 2003, pet. denied) (refusing to apply equitable principles of common fund doctrine in probate case because the probate code provides a statutory basis for an award of fees); *see also* *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 360-61 (5th Cir. 2003) (holding Texas common fund doctrine could not be used to recover plan participant's legal costs from employee benefit plan governed by ERISA because plan specified that “attorney's fees and court costs are the responsibility of the participant, not the plan”).

155. *See, e.g.*, *Crouch v. Tenneco, Inc.*, 853 S.W.2d 643, 645 (Tex. App.—Waco 1993, writ denied) (upholding award of attorney's fees to class counsel on equitable principle of “common fund”); *Arnett*, 762 S.W.2d at 954 (shareholder derivative suits); *Bayliss v. Cernock*, 773 S.W.2d 384, 386-87 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (shareholder derivative suits); *Camden Fire Ins. Ass'n*, 175 S.W. at 821 (insurance subrogation).

156. *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 867 (Tex. 2000) (Gonzales, J., concurring in part and dissenting in part). The issue whether it is reasonable to collect a fee is a separate determination.

157. *See* *Hawkins v. Owens*, No. 01-99-00918-CV, 2000 WL 1199254, at *9 (Tex. App.—Houston [1st Dist.] Aug. 24, 2000, pet. denied) (not designated for publication) (awarding attorneys' fees that were two and one-half times larger than amount paid and judgment awarded, and over five and one-half times amount of \$5,000 judgment for contract damages when “case was transformed from what should have been a simple suit on a loan agreement to a lengthy, drawn-out battle extending from 1995 to 1999”); *Flint & Assocs. v.*

Texas courts determine whether a fee is “reasonable” based upon the factors specified in Texas Disciplinary Rule of Professional Conduct 1.04.¹⁵⁸ Those factors include:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
2. the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
3. the fee customarily charged in the locality for similar legal services;
4. the amount involved and the results obtained;
5. the time limitations imposed by the client or by the circumstances;
6. the nature and length of the professional relationship with the client;
7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and
8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.¹⁵⁹

Evidence of *each* of the factors is *not* required to support an attorneys’ fees award.¹⁶⁰ However, evidence of *some* of these factors must be present to support an award.¹⁶¹

Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ denied) (attorneys’ fees awarded nearly seven times actual damages).

158. The reasonableness of an attorneys’ fee award is generally a jury question. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 367-69 (Tex. 2000). However, “expert testimony is necessary to establish the reasonableness of attorney’s fees.” *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 312 (Tex. App.—Texarkana 2003, pet. granted).

159. TEX. DISCIPLINARY R. PROF’L CONDUCT 1.04, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A (Vernon Supp. 2005). See *MCI Telecomm. Corp. v. Crowley*, 899 S.W.2d 399, 403 (Tex. App.—Fort Worth 1995, orig. proceeding [leave denied]) (“MCI’s attorneys’ fees in its defense of this case are ‘patently irrelevant’ and are not reasonably calculated to lead to the discovery of admissible evidence.”); see also *Arthur Andersen & Co.*, 945 S.W.2d at 818. The opposing party’s attorneys’ fees are not necessarily relevant to the analysis. *M.D. Mark, Inc. v. PIHI P’ship*, No. 01-98-00724-CV, 2001 WL 619604, at *12-13 (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet.) (not designated for publication). *But see DiMiceli v. Affordable Pool Maint., Inc.*, 110 S.W.3d 164, 174 (Tex. App.—San Antonio 2003, no pet.) (noting opposing counsel’s testimony regarding appellate fees in determining reasonableness of fees).

160. *Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 899, 899 (Tex. App.—Dallas 2003, no pet.); *Columbia Rio Grande Reg’l Hosp. v. Stover*, 17 S.W.3d 387, 397 (Tex. App.—Corpus Christi 2000, no pet.); *Herring v. Bocquet*, 21 S.W.3d 367, 368 (Tex. App.—San Antonio 2000, no pet.). The Amarillo Court of Appeals held that the court can also consider “the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties.” *Hagedorn v. Tisdale*, 73 S.W.3d 341, 353 (Tex. App.—Amarillo 2002, no pet.).

161. See *Castle Tex. Prod. Ltd. P’ship v. Long Trusts*, 134 S.W.3d 267, 287-88 (Tex. App.—Tyler 2003, pet. denied) (holding fee award unreasonable based on lack of testimony regarding Rule 1.04 factors); *City of Weatherford v. Catron*, 83 S.W.3d 261, 272-73 (Tex. App.—Fort Worth 2002, no pet.) (affirming award of fees where evidence was presented on five of factors’ jury questions included an instruction outlining factors, and party requested a specific amount of fees); *Hagedorn*, 73 S.W.3d at 353; *Sieber & Calicut, Inc. v. La Gloria Oil & Gas Co.*, 66 S.W.3d 340, 351 (Tex. App.—Tyler 2001, pet. denied) (upholding trial court’s denial of fee award where there was no evidence to support any of

A. THE ANDERSEN STANDARD

The most oft cited Texas case regarding the reasonableness of contingent fee awards is *Arthur Andersen & Co. v. Perry Equipment Corp.*¹⁶² According to *Andersen*, a trial court cannot award attorneys' fees purely on evidence of a percentage fee agreement.¹⁶³ Instead, the Court held that a trial court must take into consideration all of the Rule 1.04 factors when making an award of attorneys' fees.¹⁶⁴

In *VingCard A.S. v. Merrimac Hospitality Systems, Inc.*, the Fort Worth Court of Appeals, interpreting *Andersen*, held that an attorney can still request that the jury calculate attorneys' fees as a percentage of damages awarded.¹⁶⁵ Because the jury in that case "was free to reject his requested percentages under the issue submitted, which required them to award only a specific dollar amount," the award was held *not* to violate the principles articulated by the Texas Supreme Court in *Andersen*.¹⁶⁶ The percentage in *VingCard* was based upon the Rule 1.04 factors.¹⁶⁷

B. APPLYING THE RULE 1.04 FACTORS

As stated, *Andersen* demands that the Rule 1.04 factors be considered in calculating a reasonable fee.¹⁶⁸ Although one of the Rule 1.04 factors requires consideration of "the results obtained," a recent opinion from the Houston Court of Appeals confirms that a party cannot escape an award of attorneys' fees solely by arguing that the fees awarded are excessive as compared to the damages awarded. In *C.M. Asfahl Agency v. Tensor, Inc.*,¹⁶⁹ the plaintiff prevailed on its underlying breach of contract claim and was awarded \$906,793.90 in actual damages and additional damages of \$518,686.10 under the Sales Representative Act.¹⁷⁰ The jury

1.04 factors); *M.D. Mark, Inc.*, 2001 WL 619604, at *12-13; *Aquila S.W. Pipeline, Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 240-41 (Tex. App.—San Antonio 2001, pet. denied.).

162. 945 S.W.2d 812, 818 (Tex. 1997). *Andersen* dealt specifically with the award of attorneys' fees in a DTPA action. However, courts have applied *Andersen*'s holding to all proceedings when the attorneys' fees are "shifted from one party to the other." *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 24 (Tex. App.—Tyler 2000, pet. denied).

163. *Andersen*, 945 S.W.2d at 818; see also *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 106 (Tex. App.—San Antonio 2003, pet. denied) (finding evidence insufficient to uphold fee award because "a party seeking fees must ask the jury to award fees in a specific dollar amount"); *Infonova Solutions, Inc. v. Griggs*, No. 04-22-00255-CV, 2003 WL 21467091, at *2 (Tex. App.—San Antonio June 25, 2003, no pet.) (affirming denial of fees when only evidence of fees in record was contingency fee contract); *Seacoast, Inc. v. LaCouture*, No. 03-96-00506-CV, 1998 WL 29966, at *8 (Tex. App.—Austin Jan. 29, 1998, pet. denied) (not designated for publication) (reversing fee award where evidence supporting attorneys' fee award consisted of attorney and client testifying to terms of contingent fee agreement).

164. *Andersen*, 945 S.W.2d at 818.

165. *VingCard*, 59 S.W.3d at 870; see also *Frost Crushed Stone Co. v. Odell Geer Constr. Co.*, 110 S.W.3d 41, 47-48 (Tex. App.—Waco 2002, no pet.).

166. *VingCard*, 59 S.W.3d at 870.

167. *Id.*

168. *Andersen*, 945 S.W.2d 812 at 818.

169. 135 S.W.3d 768, 802 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

170. *Id.* at 775.

also awarded \$1,328,922.00 in attorneys' fees and certain defendants appealed.¹⁷¹ The defendants' "chief complaint in challenging the award as excessive was that it did not bear a reasonable relationship to the damages awarded."¹⁷² In upholding the award of attorneys' fees, the Houston Court of Appeals noted that the "reasonable relationship" factor alone was not conclusive.¹⁷³ Instead, the court focused on expert testimony concerning the magnitude and complexity of the case that included a protracted discovery process that produced 93,000 documents and was "vigorously contested."¹⁷⁴ The court also noted that, in the opinion of the expert, retained counsel's \$185.00 per hour billing rate was below the market rate given the retained counsel's services, experience, and expertise.¹⁷⁵

The Texarkana Court of Appeals also recently discussed the need for clarity in documentation submitted by counsel in support of this Rule 1.04 consideration.¹⁷⁶ In *Rolling Lands Investment, L.C. v. Northwest Airport Management, L.P.*, the Texarkana Court of Appeals remanded for a determination of reasonableness and necessity of the litigant's fees despite the submission of a thorough and uncontroverted affidavit in support of the party's fee request.¹⁷⁷ The affidavit contained expert testimony that the fees were, in the affiant's opinion and based on the affiant's twenty years of experience in commercial litigation, reasonable and necessary.¹⁷⁸ It also stated that the affiant took into consideration the usual and customary fees in the location of the services, the amount in controversy, the legal questions involved, the fee arrangement with the client, the benefit conferred, and the time required.¹⁷⁹ Yet, the Texarkana Court of Appeals looked with suspicion upon the affiant's statement that the fees were justified for services that "have been or will be rendered,"¹⁸⁰ explaining that "[t]he affidavit by its own terms states that attorney's fees are based partly on services that have not even been performed but only expect to be performed."¹⁸¹ While not clear from the opinion, it is likely that the affiant was discussing fees to be awarded in the event of the appeal as those services that "will be rendered," but the lack of clarity resulted in confusion to the appellate court and ultimate

171. *Id.*

172. *Id.* at 803.

173. *Id.* (affirming award of attorneys' fees awarded for trial that exceeded three times amount of actual damages on grounds of complexity of issues raised).

174. *Id.*

175. *Id.*; see also *Cass v. Stephens*, 156 S.W.3d 38, 73 (Tex. App.—El Paso 2004, pet. filed) (finding attorneys' fees award of \$586,162.17, more than twice the amount of damages awarded, was not excessive given protracted nature of litigation and exhaustive discovery process).

176. *Rolling Lands Invs., L.C. v. N.W. Airport Mgmt., L.P.*, 111 S.W.3d 187, 201-02 (Tex. App.—Texarkana 2003, pet. denied).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

reversal of the fee award—an immeasurable price for a phrase that could have been easily clarified.¹⁸²

III. SEGREGATION OF FEES

Another common and practical problem regarding the recovery of attorneys' fees is how to recover fees for work performed in furtherance of a claim for which attorneys' fees are statutorily authorized when other claims for which attorneys' fees are *not* statutorily authorized are also asserted in the same case. The general rule in Texas is that "in a case involving more than one claim, attorneys' fees can be awarded only for necessary legal services rendered in connection with the claims from which recovery is authorized."¹⁸³ In fact, "[a] failure to segregate attorney's fees in a case containing multiple causes of action, only some of which entitle the recovery of attorney's fees, can result in the recovery of zero attorney's fees."¹⁸⁴

182. It is important to remember to properly designate an expert on attorneys' fees in discovery pursuant to the Texas Rules of Civil Procedure. *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671 (Tex. 1990). Failure to comply with this requirement results in exclusion of testimony unless the proffering party demonstrates good cause for its admission. *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). For example, in *GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*, 693 S.W.2d 617, 620-21 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.), the plaintiff's counsel called himself as an expert witness regarding attorney's fees, but he had not identified their attorney as a testifying expert in discovery. The San Antonio Court of Appeals held that testimony of the plaintiff's counsel should have been excluded by the trial court due to plaintiff's failure to identify counsel as a fee expert. *Id.*; see also *Nelson v. Schanzer*, 788 S.W.2d 81, 88 (Tex. App.—Houston [14th Dist.] 1990, writ denied). *But see* *Wilson v. Chazanow*, 105 S.W.3d 21, 28 (Tex. App.—Corpus Christi 2002, no pet.) (affirming trial court's admission of attorney testimony when attorney was mistakenly designated as fact witness instead of expert witness in pretrial disclosures). However, at least one Texas court has held that an attorney who has not been identified as an *expert* witness with regard to attorney fees can still testify as a *fact* witness regarding the *facts* of his representation. *Budd v. Gay*, 846 S.W.2d 521, 524 (Tex. App.—Houston [14th Dist.] 1993, no writ); TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 *et seq.* (Vernon 1997 & Supp. 2005); see also *In re Striegler*, 915 S.W.2d 629, 643-44 (Tex. App.—Amarillo 1996, writ denied).

183. *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624 (Tex. App.—Dallas, writ denied); see also *Geodyne Energy Income Prod. P'ship I-E v. Newton Corp.*, 97 S.W.3d 779, 789 (Tex. App.—Dallas 2003, pet. granted); *Am. Hallmark Ins. Co. v. Lyde*, No. 05-97-01611-CV, 2000 WL 1702597, at *9 (Tex. App.—Dallas Nov. 15, 2000, pet. denied) (not designated for publication) ("segregation of attorneys' fees is required between claims which allow recovery of fees and claims which do not."). This rule also applies to claims against different parties. See *Willis v. Donnelly*, 118 S.W.3d 10 (Tex. App.—Houston [14th Dist.] 2003, pet. filed) ("[W]hen a lawsuit involves multiple claims or multiple parties, the proponent has a duty to segregate non-recoverable fees from recoverable fees, and to segregate the fees owed by different parties."); *Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 565 (Tex. App.—Texarkana 2003, pet. denied) ("The general rule is that attorney's fees attributable to other defendants . . . must be segregated."). However, this rule does not require a party to segregate time spent on different theories of the same cause of action. *Id.*

184. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). However, at least one court of appeals in Texas held that, in a *breach of contract* case, a party prevailing on a breach of contract claim who fails to segregate fees for non-recoverable claims should not be completely denied fees. See *Willis*, 118 S.W.3d at 25 n.29. Of course if objection to such a failure to segregate is not made, the objection to recovery of all fees is waived. *Id.*;

However, where the claims are “dependent upon the same set of facts or circumstances and are thus intertwined to the point of being inseparable, the party suing for attorneys’ fees may recover the entire amount covering all claims.”¹⁸⁵ For this exception to apply, the claims must be so similar that the same facts must need to be proved for both claims to succeed.¹⁸⁶ In *Air Routing International Corp. (Canada), ARG, v. Britannia Airways, Ltd.*,¹⁸⁷ the Houston Court of Appeals recently determined that a trial court could find claims to be intertwined to the point of being inseparable without specifically concluding that the legal elements of each of the claims are the same or substantially similar. The Houston Court of Appeals noted that several appellate courts had compared the essential legal elements of the claims in question when making the intertwined determination,¹⁸⁸ but the Houston Court of Appeals concluded that such a specific determination was not required because the Texas Supreme Court only requires a broader finding that the various claims be dependent upon the same set of facts or circumstances.¹⁸⁹

Of course, to be entitled to all of a group of intertwined fees, the party seeking fees must have prevailed on the claim that provides for the recovery of fees.¹⁹⁰ Further, the court—not the fact finder—makes the determination of whether fees must be segregated.¹⁹¹ To be sustained on appeal, the trial court must specifically perform this segregation analysis when evaluating the attorneys’ fee award.¹⁹²

Mekdessi v. RISC, Inc., No. 2-02-169-CV, 2003 WL 1564304, at *4 (Tex. App.—Fort Worth Mar. 27, 2003, pet. denied).

185. *City of Alamo v. Espinosa*, No. 13-99-704-CV, 2001 WL 1003309, at *13 (Tex. App.—Corpus Christi Aug. 31, 2001, pet. dismissed by agr.); *World Help v. Leisure Lifestyle, Inc.*, 977 S.W.2d 662, 684 (Tex. App.—Fort Worth 1998, pet. denied); *S. Concrete Co. v. Metrotec Fin. Inc.*, 775 S.W.2d 446, 449-51 (Tex. App.—Dallas 1989, no writ); *Schindler v. Austwell Farmers Coop.*, 829 S.W.2d 283, 288 (Tex. App.—Corpus Christi 1992) (not designated for publication), *aff’d* 841 S.W.2d 653 (Tex. 1992) (granting total amount of fees billed when “causes of action are so intertwined that they are more or less inseparable”).

186. *See, e.g., Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture*, 50 S.W.3d 531, 551 (Tex. App.—El Paso 2001, no pet.); *Lesikar v. Rappaport*, 33 S.W.3d 282, 317 (Tex. App.—Texarkana 2000, pet. denied). The Texarkana Court of Appeals recently noted that the test can be met “with evidence of unsegregated attorneys’ fees and a rough percent of the amount attributable to the breach of contract claim.” *Flagship Hotel*, 117 S.W.3d at 565 n.7.

187. 150 S.W.3d 682, 690-91 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

188. *Id.* (citing *Geodyne Energy Income Prod. P’ship I-E*, 97 S.W.3d at 789-90; *Z.A.O., Inc.*, 50 S.W.3d at 550-51; *AU Pharm., Inc. v. Boston*, 986 S.W.2d 331, 337 (Tex. App.—Texarkana 1999, no pet.); *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 41 (Tex. App.—Amarillo 1997, writ denied); *Panizo v. YMCA of the Greater Houston Area*, 938 S.W.2d 163, 169-71 (Tex. App.—Houston [1st Dist.] 1996, no writ).

189. *Routing Int’l*, 150 S.W.3d at 691.

190. *Huddleston v. Pace*, 790 S.W.2d 47, 51 (Tex. App.—San Antonio 1990, writ denied).

191. *Merch. Ctr., Inc. v. WNS, Inc.*, 85 S.W.3d 389, 397 (Tex. App.—Texarkana 2002, no pet.).

192. *Rainbow Group, Ltd. v. Johnson*, No. 03-00-00559-CV, 2002 WL 1991141, at *11 (Tex. App.—Austin 2002, pet. denied) (not designated for publication). Of course, an objection to the opposing party’s failure to segregate fees is waived if it is not made at the time the evidence of fees is presented or at the time of the charge. *Beard Family P’ship v. Commercial Indem. Ins. Co.*, 116 S.W.3d 839, 850 (Tex. App.—Austin 2003, no pet.);

Similarly, the general rule in Texas is that segregation of fees is required if a litigant prosecutes a counterclaim that permits recovery of attorneys' fees and also defends a claim in the same action; however, segregation is not required if the fees cannot be allocated between prosecuting the counterclaim and defending the claim.¹⁹³ Stated another way, if the plaintiff must defeat the counterclaim to succeed on the principal claim because they arise out of the same facts and are mutually exclusive, then the time spent to defend against the counterclaim need not be segregated from the time spent pursuing the claim.¹⁹⁴

IV. RECOVERY OF COSTS AND EXPENSES

Similar to attorneys' fees, costs and expenses are *not* recoverable unless there is a statute which expressly provides for recovery of the same.¹⁹⁵

A. RECOVERING COSTS

As a general rule "each party to a suit shall be liable to the officers of the court for all costs incurred by himself."¹⁹⁶ However, many costs are recoverable by statute. For example, section 31.007 of the Civil Practice and Remedies Code allows a judge to "include in any order or judgment all costs," including:

1. clerk's fees and any service fees due to the county;
2. court reporter's fees for original stenographic transcripts obtained to use in the suit;
3. the fee for masters, interpreters, and guardians ad litem appointed by the court; and
4. other costs and fees that are permitted by these rules and state statutes.¹⁹⁷

More importantly, Rule 131 of the Texas Rules of Civil Procedure entitles a successful party to recover "all costs incurred therein" from its ad-

Holmes v. Concord Homes, Ltd., 115 S.W.3d 310, 313 (Tex. App.—Texarkana 2003, no pet.).

193. Pegasus Energy Group, Inc. v. Cheyenne Petroleum Co., 3 S.W.3d 112, 130 (Tex. App.—Corpus Christi 1999, pet. denied); Coleman v. Rotana, Inc., 778 S.W.2d 867, 873-74 (Tex. App.—Dallas 1989, writ denied); Wilkins v. Bain, 615 S.W.2d 314, 316 (Tex. Civ. App.—Dallas 1981, no writ) (granting all fees when the claim to recover the contract price involves the same facts as the counterclaim).

194. Pegasus Energy Group, Inc., 3 S.W.3d at 130. *But see* Willis v. Donnelly, 118 S.W.3d 10, 44-45 (Tex. App.—Houston [14th Dist.] 2003, pet. filed) (reversing and remanding fee award for failure to segregate fees in defending counterclaims and jury charge asked for award of all fees in case).

195. "Ordinary expenses incurred by a party in prosecuting or defending suit cannot be recovered either as damages or by way of court costs in the absence of statutory provisions or usages of equity." Flint & Assocs. v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 626 (Tex. App.—Dallas, writ denied); *see also* Brandtjen & Kluge v. Manney, 238 S.W.2d 609, 612 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.). To the extent possible, the award should also be segregated into the amount attributable to the portion of the case that is successful on appeal. Holland v. Nelson, No. 05-02-00283-CV, 2003 WL 22180444, at *2 (Tex. App.—Dallas Sept. 23, 2003, pet. denied).

196. TEX. R. CIV. P. 140.

197. TEX. CIV. PRAC. & REM. CODE ANN. § 31.007 (Vernon 1997 & Supp. 2005).

versary.¹⁹⁸ “Rule 131’s underlying purpose is to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs,”¹⁹⁹ and the court can stray from this mandatory requirement only “for good cause.”²⁰⁰

“‘Good cause’ is an elusive concept that varies from case to case.”²⁰¹ Generally good cause will be found when a party unnecessarily prolongs proceedings, unreasonably increases costs, or generally does some act worthy of sanction.²⁰² Good cause will not, however, be found merely because a prevailing party rejected a settlement offer larger than the damage award.²⁰³ Normally, the non-prevailing party’s inability to pay the court costs does not in and of itself constitute good cause,²⁰⁴ but some appellate courts have indicated ability to pay can factor into a good cause decision.²⁰⁵ Courts have also shown a willingness to find good cause when the prevailing party benefits in some way from the activities that created the court costs.²⁰⁶

If the court determines costs should *not* be awarded, then the lack of

198. TEX. R. CIV. P. 131. However, it should be noted that the statute provides for recovery of costs “except where otherwise provided.” *Id.*

199. *Furr’s Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001).

200. TEX. R. CIV. P. 141. Note, however, that the Declaratory Judgment Act provides for the award of costs to either party as are “equitable and just.” TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997 & Supp. 2005); *see, e.g.*, *W. Beach Marina, Ltd. v. Erdeljac*, 94 S.W.3d 248, 270 (Tex. App.—Austin 2002, no pet.).

201. *Furr’s*, 53 S.W.3d at 377.

202. *Id.*

203. *Nicholson v. Tashiro*, 140 S.W.3d 445, 448 (Tex. App.—Corpus Christi 2004, no pet.) (reversing trial court’s refusal to order costs because prevailing plaintiff rejected settlement offer because “a judge is not allowed to penalize a party for refusal to enter into settlement negotiations”) (citing *Gleason v. Lawson*, 850 S.W.2d 714, 717-18 (Tex. App.—Corpus Christi 1993, no writ)).

204. *Dean’s Campin’ Co. v. Hardsteen*, No. 01-00-01190-CV, 2002 WL 1980840, at *7 (Tex. App.—Houston [1st Dist.] Aug. 29, 2002, pet. denied) (“Ability to pay . . . does not constitute good cause, as contemplated by Rule 141, to depart from the general rule stated in Rule 131.”).

205. *See Price Constr., Inc. v. Castillo*, 147 S.W.3d 431, 443 (Tex. App.—San Antonio 2004, no pet.); *Davis v. Henley*, 471 S.W.2d 883, 885 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref’d n.r.e.) (remanding ad litem fee issue to trial court for determination of “(1) whether the minor or adult [non-prevailing] plaintiffs have the ability to pay the ad litem fee; and (2) if not, whether good cause exists under Rule 141 to tax all or part of the ad litem fee against [defendant] as the prevailing party” and holding unsuccessful minor’s inability to pay guardian ad litem fees is sufficient to awarding such fees against successful party when considered along with other factors). During the Survey period, the Houston Court of Appeals (Fourteenth District) upheld a trial court’s order finding of good cause based on the prevailing party’s ability to pay guardian ad litem costs and fees. *City of Houston v. Woods*, 138 S.W.3d 574, 581 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The court, however, qualified this holding by noting “without the record of the evidentiary hearing, we must presume the evidence supports a finding of good cause.” *Id.*

206. *See Rusk v. Runge*, No. 14-02-00481-CV, 2003 WL 22672182, at *4-5 (Tex. App.—Houston [14th Dist.] Nov. 13, 2003, pet. denied) (allocation of receiver’s costs to prevailing party was supported by, among other things, a specific finding that non-prevailing party had benefited from receiver’s ability to protect his assets from creditors); *Henley*, 471 S.W.2d at 884 (noting that prevailing defendants derived a benefit from appointment of guardian ad litem).

good cause for such an award must be specifically stated on the record.²⁰⁷ Furthermore, even when the trial court states good cause on the record “an appellate court should scrutinize the record to determine whether it supports the trial judge’s decision.”²⁰⁸

B. NON-RECOVERABLE COSTS

Some costs are specifically disallowed, either by statute or case law. For example, Rule 902(10)(a) of the Texas Rules of Evidence requires a party to bear its own copying costs if it chooses to copy records attached to affidavits filed by another party.²⁰⁹ Similarly, Texas Rule of Civil Procedure 140 prohibits including copy charges in an award of costs.²¹⁰ Case law also disallows certain items, such as expert witness fees²¹¹ and costs for certified copies of deeds used at trial.²¹² For example, the Dallas Court of Appeals held that ordinary expenses like photocopy, travel, long distance, postage, filing fees, fax charges, and messenger/courier expenses are typically not recoverable as expenses because they are considered part of “the overhead of a law practice” and can be recovered as a component of reasonable attorneys’ fees at least pursuant to section 38.001.²¹³

V. CONCLUSION

This article is intended to update business litigants on recent developments in the field of recovering attorneys’ fees and to provide these busi-

207. *Roberts v. Williamson*, 111 S.W.3d 113, 124-25 (Tex. 2003); *Furr’s*, 53 S.W.3d at 376.

208. *Allen v. Crabtree*, 936 S.W.2d 6, 9 (Tex. App.—Texarkana 1996, no writ) (citing *Rogers v. Wal-Mart Stores, Inc.*, 686 S.W.2d 599, 601 (Tex. 1985)); *Moore v. Trevino*, 94 S.W.3d 723, 729 (Tex. App.—San Antonio 2002, pet. denied) (“Because appellees were the prevailing parties below and ‘good cause’ for not awarding costs to them is not stated on the record, the trial court abused its discretion in failing to award appellees costs pursuant to Rule 131.”); *Finlay v. Olive*, 77 S.W.3d 520, 528 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (finding trial court abused its discretion in not awarding costs to successful party and stating that “we do not presume that the trial court made the necessary finding in this situation”); see also *Ray v. McFarland*, 97 S.W.3d 728, 730-31 (Tex. App.—Fort Worth 2003, no pet.) (reversing trial court’s judgment setting aside jury verdict on good faith and just cause and holding that “[a]ccordingly, [the plaintiff] was the successful party at trial” and since “the judgment did not state that the trial court was holding [the plaintiff] responsible for her own costs for ‘good cause,’” the trial court abused its discretion in taxing court costs against the party incurring them (quoting *TEX. R. CIV. P.* 141)).

209. *TEX. R. CIV. EVID.* 904(10)(a). See *Allen*, 936 S.W.2d at 8.

210. *TEX. R. CIV. P.* 140 (providing that “no fee for a copy of a paper not required by law or these rules to be copied shall be taxed in the bill of costs”).

211. See *City of Houston v. Biggers*, 380 S.W.2d 700, 705 (Tex. Civ. App.—Houston 1964, writ ref’d n.r.e.); see also *Allen*, 936 S.W.2d at 8.

212. *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.); see also *Allen*, 936 S.W.2d at 8.

213. *Arthur’s Garage, Inc. v. Racal-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803, 817 (Tex. App.—Dallas 1999, no pet.); *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 626-27 (Tex. App.—Dallas 1987, writ denied); see also *Shaikh v. Aerovias De Mex.*, 127 S.W.3d 76, 82 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding costs of copies of deposition transcripts, videotapes, and litigation documents and costs associated with travel of counsel to attend deposition were not properly recoverable and were part of the “expenses of litigation”).

ness litigants with tools helpful in recovering (or defending against the recovery of) attorneys' fees in Texas. As with any field of law, this recovery is an art, not a science, is ever-changing, and oft times requires trial and error to succeed.