



Understanding Recovery of Attorneys' Fees

The general framework for the recovery of attorneys' fees in civil litigation can be difficult to understand. It is common for clients to believe that if they prevail in the case, their attorneys' fees will be paid by the other side. It is less common for clients to believe that if they lose, they may have to pay the other side's attorneys' fees (as well as their own). Both of these can happen, but only in some circumstances. Being entitled to recover attorneys' fees can make a significant difference in how the case is handled and ultimately settled.

Many cases filed in this country are governed by the "American Rule," meaning that each side bears its own attorneys' fees and court costs unless a state or federal law or an agreement between the parties says otherwise. Further, even when a law allows the recovery of attorneys' fees, there are often conditions on that recovery.

Under Texas law, the parties are free to agree in a contract how attorneys' fees are handled in a later dispute between them. In many cases, the parties agree to something like: "the prevailing party shall be entitled to recover its reasonable and necessary attorneys' fees." Although there is sometimes a dispute over who exactly is the "prevailing party," such as when both parties have affirmative claims for relief and each win some and lose some, courts can generally enforce these provisions with little difficulty.

However, Texas also contains a statute allowing for the recovery of attorneys' fees in a breach of contract claim that has proven much more difficult to enforce. (Tex. Rev. Civ. Prac. & Rem. Code 38.001) The statute provides that a person can recover reasonable attorney's fees from an individual or corporation if the claim relates to contracts or payment for services. There are several limitations contained in this language. First, the statute allows recovery only by the *prevailing claimant*. Thus, a party defending against a claim cannot recover its attorneys' fees. Second, the statute has, fairly recently, begun to be interpreted to allow recovery only against an *individual* or a *corporation*. Plaintiffs in contract suits against partnerships or limited liability companies would not be entitled to attorneys' fees under the current interpretation of Texas law. The Texas Supreme Court has not yet spoken on this issue; the statute has also been the subject of proposed amendments during the last two Texas legislative sessions with no success.

Many state and federal laws expressly provide for the recovery of attorneys' fees. However, some are designed to be somewhat one sided, particularly in the areas of consumer protection or employment law. For example, the Texas Deceptive Trade Practices Act ("DTPA") allows a plaintiff to recover reasonable and necessary attorneys' fees if the plaintiff is successful on its claim, but the defendant may only recover its fees if the plaintiff's claim was groundless in fact or brought for the purpose of harassment. Similarly, the federal law governing payments to workers, particularly in the area of overtime compensation (Fair Labor Standards Act), allows for

the recovery of attorneys' fees by the plaintiff if the plaintiff is successful, but most courts have found that the defendant/employer can only recover upon a showing that the action was brought in bad faith.

Most common law (that is, non-statutory) claims do not allow for the recovery of attorneys' fees by either party. However, sometimes there is a comparable statutory claim that can be added in order to try to obtain recovery of fees. For example, a common law claim for fraud would not allow for the recovery of attorneys' fees, but depending on the facts, the claim could potentially be brought for statutory fraud in a real estate transaction (Tex. Bus. & Comm. Code § 27.01) or violations of the DTPA, both of which provide for the recovery of attorneys' fees. Another frequently used statute allows a party to request that the court declare its finding on a question of contract interpretation of the law (Declaratory Judgment Act, Tex. Civ. Prac. & Rem Code § 37.003), which allows the court discretion to award fees to the prevailing party.

Another complicating factor is that sometimes fees may be allowed in connection with one claim but not with all claims. Thus, if the attorneys in a case spent 30% of the hours on a case dealing with claims for which fees were recoverable, and 70% of their time dealing with claims for which fees were not recoverable, a prevailing party could (theoretically) recover about 30% of their total fees incurred in the case.

In sum, it is a good idea to have discussions with counsel earlier rather than later to confirm expectations on the recovery of attorneys' fees.

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