



New Changes in LLC Litigation & Recovery of Legal Fees

In Texas, courts presume that each party will pay for their respective legal fees unless a contract or statute allows for the recovery of legal fees to the prevailing party. Many of our business and construction clients are forced to litigate breach of contract claims on occasion. The simplest method to ensure legal fees can be recovered by a successful party in a breach of contract action is to explicitly state so in the contract. If not stated in the contract, Texas Civil Practice & Remedies Code § 38.001 allows for the recovery of reasonable attorneys' fees in a breach of contract action. However, the statute as currently drafted allows for this recovery "from an individual or corporation" only.

Courts have considered whether a partnership or LLC falls within the "individual or corporation" definition. Over the past few years, many Texas courts have determined that the legislature could have clearly specified that it applied to LLCs or partnerships and chose to omit those entities. Therefore, Section 38.001 does **not** allow for recovery of legal fees when successfully suing a partnership or LLC under a breach of contract theory. In other words, a plaintiff could recover its legal fees if it successfully sued "Defendant, **Inc.**" but not "Defendant, **LLC**" or "Defendant, **LP.**" LLCs and partnerships effectively had a loophole to avoid an award of attorneys' fees against them even when the other party prevailed at trial.

To close this loophole, on June 15, 2021, Governor Abbott signed House Bill 1578 into law. Effective September 1, 2021, the current law is modified to allow for recovery of attorneys' fees in breach of contract claims against all "organizations" as defined by the Texas Business Organizations Code. Tex. Civ. Prac. & Rem. Code § 38.001. This definition includes LLCs, partnerships, and virtually all other entity structures. In other words, the loophole closes on September 1st.

In preparation for this law's effective date, a party considering a breach of contract lawsuit should first determine the entity structure of the other part(ies). If the contract does not allow for the prevailing party to recover its legal fees, then one should consider whether to file suit before September 1st (to remove fee recovery from the equation) or after September 1st (to allow for the recovery of fees against any organization).

As a more fundamental consideration, clients should consider whether they want to allow for the award of legal fees in a dispute. The contract between the parties is still the primary vehicle to allocate how, when, and how much can be awarded in attorneys' fees. Unfortunately, in some cases the promise of recovering legal fees can drive parties to pursue lawsuits that might otherwise be avoided.

With these new legislative changes, this is the time to revisit your contracts and discuss the provisions regarding recovery of legal fees with our team of attorneys.

For more information, please contact [Andy Harris](#).