

ATTORNEY'S FEES UPDATE

**Jason M. Powers
Tracey R. Keegan**

**VINSON & ELKINS L.L.P.
1001 Fannin, Suite 2500
Houston, Texas 77002
713-758-2222
www.velaw.com**

**South Texas College of Law
Advanced Civil Trial Law Conference
February 28-29, 2008**

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Attorney's Fees Update

I. INTRODUCTION

The last two years have seen significant developments in Texas case law on the recovery of attorney's fees from opposing litigants, as well as in the case law on attorney-client fee agreements. Among other things, the Texas Supreme Court and the appellate courts decided important issues relating to:

- The circumstances in which a party—having incurred fees both for claims as to which fees are recoverable and those as to which they are not—must segregate the fees incurred and time spent for purposes of proving fees to the court;
- The effect of the Civil Practice & Remedies Code's "presentment" requirement on the availability of fees against an under-insured motorist insurer;
- The time period for which an insurer that impleads policy proceeds may owe fees as a prompt-payment penalty;
- The recoverability of a prevailing party's fees as to counterclaims that mirror a plaintiff's claims;
- Whether a Section 1983 plaintiff may recover fees absent an entitlement to compensatory damages (rather than nominal damages);
- The manner in which a court assessing sanctions for frivolous pleadings considers an aggrieved party's actual fees incurred; and
- Limitations on termination provisions in contingent fee contracts.

Below, we discuss these and other recent significant cases on the availability and recovery of attorney's fees.

II. PROVING ATTORNEY'S FEES

A. Proving that fees are reasonable and necessary.

Before a court can award attorney's fees, the party requesting fees bears the burden of proving that the fees requested are reasonable and necessary. *See Dilston House Condo. Ass'n v. White*, 230 S.W.3d 714, 716-18 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 751 (Tex. App.—Houston [14th Dist.] 2005, no pet.)). The reasonableness of fees, a fact question, must be supported by competent evidence. *See id.* at 716. This rule applies even where the entitlement to fees is mandatory under a relevant statute. *See id.* at 718.

General or vague assertions that a particular fee would be reasonable are insufficient to support an award of attorney's fees, where the evidence is not based on consideration of the specific relevant factors identified by the Texas Supreme Court in *Arthur Andersen & Co. v. Perry Equipment Corporation*. *See Dilston House*, 230 S.W.3d at 718 (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). In *Dilston House*, the defendant condominium association sought fees under a mandatory fee statute, but offered no evidence of its own fees. Instead, the association sought to rely on its cross examination of the plaintiff's counsel, who had testified that a fee "somewhere in the range" of what plaintiff had incurred could be reasonable for the defense's fee as well. *See id.* at 717. The trial court refused to award fees, and the appeals court affirmed.

The evidentiary factors to which the *Dilston House* court referred are eight familiar factors identified by the Texas Supreme Court as relevant to the trial court's consideration in evaluating the reasonableness of attorney's fees. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). Those factors are:

- (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., 945 S.W.2d at 818.

This list, drawn from Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, overlaps substantially with the factors identified by the Fifth Circuit for purposes of analyzing of the reasonableness of fee awards in the class action context in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).

The *Arthur Andersen* factors are non-exclusive. See *Sandles v. Howerton*, 163 S.W.3d 829, 838 (Tex. App.—Dallas 2005, no pet.). In addition to the listed factors, the court may consider the entire record and the common knowledge of the lawyers and judges. See *In re M.A.N.M.*, 231 S.W.3d 562, 567 (Tex. App.—Dallas 2007, no pet.) (citing *Sandles*, 163 S.W.3d at 838; *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

While a party’s proof of fees must be based on the *Arthur Andersen* factors, a party need not address each *Arthur Andersen* factor in order to support an award of fees. See *In re M.A.N.M.*, 231 S.W.3d 562, 567 (Tex. App.—Dallas 2007, no pet.) (although there was no testimony about ex-wife’s attorney’s hourly rate or the number of hours he spent on the case, his testimony as to the total fees and their reasonableness was

sufficient to uphold award under the Family Code); see also *Hays & Martin, L.L.P. v. Ubinas-Brache*, 192 S.W.3d 631, 636-37 (Tex. App.—Dallas 2006, pet. denied) (same).

Below, we identify recent cases addressing particular *Arthur Andersen* factors:

1. Time and labor required; novelty and difficulty of questions; skill required

Under *Arthur Andersen* and *Johnson*, the fact finder considers the time and labor spent by attorneys, taking into account factors such as the time required to complete the tasks at issue, the quality of the attorney’s work product, and whether the case presents challenging issues of first impression. See *Johnson*, 488 F.2d at 717-18; *Arthur Andersen & Co.*, 945 S.W.2d at 818.

To present evidence on the time and labor required, the fee claimant should submit testimony regarding the duration of specific tasks and describe the work performed. See *Brazos Elec. Power Co-op. v. Weber*, 238 S.W.3d 582, 586 (Tex. App.—Dallas 2007, no pet. h.) (condemnation attorney testified as to negotiations with condemning authority over an eight-month period, hiring and presenting an expert, and participating in a special commissioners hearing).

Evidence of the time and labor required may also be presented by admitting the attorney’s invoices for work performed on the case or presenting evidence of unusual circumstances affecting the progress of the case. See *Cox v. Wilkins*, No. 03-05-00110-CV, 2006 WL 821202, *7 (Tex. App.—Austin Mar. 31, 2006, pet. denied) (mem. op.). In *Cox*, the attorney’s detailed invoices were admitted, explicitly describing each task performed, the amount of time spent on each task, whether the task was performed by the attorney or by one of his paralegals, and the hourly rate charged. *Id.* Additionally, the fee claimant’s attorney also testified that he spent more time than he would have expected on a collection case of the type at issue because his opponent acted *pro se* for much of the underlying proceedings; the record indicated that the *pro se* party’s questionable behavior, which included lying to the court in seeking a continuance, resulted in a waste of resources. *Id.*

2. Preclusion of other employment

The *Johnson* court stated that “[t]his guideline involves the dual consideration of otherwise available business which is foreclosed because of conflicts of interest which occur from the representation, and the fact that once the employment is undertaken the attorney is not free to use the time spent on the client’s behalf for other purposes.” See *Johnson*, 488 F.2d at 718; see also *Mandell v. Mandell*, 214 S.W.3d 682, 690-91 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (attorney testified that he spent seven to eight months responding to a claim in excess of one million dollars and was deprived of employment on other cases due to the resources required to respond to the suit). However, it is not clear that an attorney’s having refused other employment, standing alone, necessarily justifies an upward departure from the product of a reasonable fee and the number of hours necessary to represent the client. Cf. *Land Rover U.K. Ltd. v. Hinojosa*, 210 S.W.3d 604, 608-09 (Tex. 2006) (“absent exceptional circumstances” or a specific rule provision, guardian ad litem, whose compensation is largely based on the same Rule 1.04 factors applied to other attorney’s fees questions, should not have been awarded \$25,000 more than reasonable hourly fees as compensation for turning down retainers in other matters).

3. Fee customarily charged in the locality for similar legal services

Evidence of the “customary fee” factor includes testimony of the standard fee for similar legal services in the county of the suit. See *Weber*, 238 S.W.3d at 586-87 (defendant’s attorney testified he was familiar with the fee customarily charged in the county because he had been performing similar legal services in the county for over thirty years). This testimony can include a range of standard fees or standard contingency percentages. *Id.*

In addition to testifying regarding his or her own knowledge of the customary fee, an attorney can introduce third-party evidence, such as survey data, supporting his or her testimony regarding the customary fee. See *Travelers Indem. Co. v. Espinosa*, No. 01-05-00836-CV, 2007 WL 1559936, at *3 (Tex. App.—Houston [1st Dist.] Mar. 31, 2007, no pet.) (mem op.) (to support his showing that his fees were in line with fees

customarily charged in the locality for similar legal services, defendant’s attorney attached an article from the *Texas Lawyer* entitled “Charging More in 2004,” which explained that “billing rates [were] up slightly at Texas firms”).

4. Amount involved and results obtained

In assessing fees, the *Johnson* court stated that the court should consider both the amount of damages awarded and the effect on the law of the decision obtained. See *Johnson*, 488 F.2d at 718-19.

For the purpose of determining an appropriate fee, one recent case shows that results obtained may include not only a judgment after a contested trial, but also pretrial work and services that have outcome-determinative impact. See *Weber*, 238 S.W.3d at 586. In *Weber*, a condemnation case, the defendant’s attorney testified that as a result of lengthy negotiations with the condemning authority, the amount of land targeted for condemnation was reduced. See *id.* In addition, a special commissioners’ hearing resulted in his client’s being awarded a significantly higher price for the property that was to be condemned, leading the condemning authority to drop the condemnation proceeding rather than pay the increased value. *Id.* The court found both successes relevant in upholding the award of attorney’s fees under Texas Property Code § 21.109(b).

5. Time limitations imposed by client or circumstances

A client’s priority work that delays the lawyer’s other legal work should be considered in the award of attorney’s fees. See *Johnson*, 488 F.2d at 718. This factor is particularly important when new counsel is called in to prosecute the appeal or handle other matters at a late stage in the proceedings. *Id.*

6. Nature and length of professional relationship with the client

A lawyer in private practice may vary his fee for similar work in the light of the professional relationship of the client with his office. See *Johnson*, 488 F.2d at 719. The court may appropriately consider this factor in determining the amount of fees that would be reasonable. *Id.*

A longstanding relationship with a client may be relevant evidence of a reasonable attorney fee. *See Weber*, 238 S.W.3d at 585-86 (defendant's attorney testified that because he had known and represented the condemnee for approximately thirty years, he agreed to a lower contingency fee rate (20%) than was customary in the county; this testimony supported defendant's argument that the contracted contingency fee was "more than fair" and the court's finding that the award based on that contracted fee was reasonable); *see also Mandell*, 214 S.W.3d at 691 (the appellee's attorney had testified at trial to a long standing relationship with the appellee and that he had thirty-three years' experience as the administrator and representative of estates like those at issue in the case).

7. Experience, reputation, and ability of lawyers performing services

While longevity *per se* does not dictate a higher fee, *see Johnson*, 488 F.2d at 718, the court may consider evidence of how long the attorney has practiced, any specializations the attorney has achieved, and the number of similar cases the attorney has handled in arriving at a reasonable fee. *See Weber*, 238 S.W.3d at 585-86; *see also Bryan v. Bryan*, No. 04-06-00553-CV, 2007 WL 2042759, *2 (Tex. App.—San Antonio July 18, 2007, no pet.) (mem. op.) (attorney testified as twenty-five years of practice experience, mainly in the area of family law, a specialty in which she had been board certified for six years).

8. Whether fee is fixed or contingent, or collection is uncertain

The fact that a case is handled on a contingency basis is relevant to a fee award, but a party may not merely offer his contingent fee contract and seek a recovery of attorney's fees on that basis alone. *See Mercier v. Southwestern Bell Yellow Pages, Inc.*, 214 S.W.3d 770, 777 (Tex. App.—Corpus Christi 2007, no pet.) (citing *Arthur Andersen*, 945 S.W.2d at 818). Rather, a party's proof must include evidence of the Rule 1.04 factors so that fact finder has a meaningful way to determine if the fees were reasonable and necessary. *Id.* (citing *Arthur Andersen*, 945 S.W.2d at 818-19). Moreover, the fact finder must award attorney's fees in a specific dollar amount rather than as a percentage of some unknown recovery. *See Arthur Andersen*, 945 S.W.2d at 819.

A court has discretion to consider that a case was handled on contingency as one of several "enhancement factors" under *Johnson* for purposes of awarding fees in an amount greater than the "lodestar" amount. *See City of Houston v. Levingston*, 221 S.W.3d 204, 236-37 (Tex. App.—Houston [1st Dist.] 2006, no pet. h.) (affirming award of fees approximately 13% greater than the lodestar amount, where plaintiff showed that case was handled on contingency, involved substantial discovery, was tried over two weeks, involved numerous fact and expert witnesses, involved voluminous documentary evidence, and contained complicated legal issues).

B. Manner of proof

1. Testimony of case counsel and other experts

Generally, the issues of reasonableness and necessity of attorney's fees must be proven through expert testimony. *See Twin City Fire Ins. Co. v. Vega-Garcia*, 223 S.W.3d 762, 770 (Tex. App.—Dallas 2007, pet. denied) (citing *Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied)). As with all expert testimony, the proponent of expert testimony on attorney's fees bears the burden of demonstrating that the expert is properly qualified and that his or her testimony is relevant and reliable. *See id.* at 770-71 (citing TEX. R. EVID. 702; *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998)).

An attorney's testimony that fees are reasonable and necessary is legally sufficient if supported by facts relevant to the Rule 1.04 factors. *See State and County Mutual Fire Insurance Co. v. Walker*, 228 S.W.3d 404, 409 (Tex. App.—Fort Worth 2007, no pet. h.). In *Walker*, the fee claimant's attorney testified regarding his professional experience and background, described the work performed and the time spent on the case, and testified as to his familiarity with reasonable charges in the locality. *See id.* The appeals court held that the attorney's testimony as to reasonableness and necessity, being based on facts rather than conclusory assertions, was legally sufficient to support an award of fees. *See id.*

On the other hand, an attorney's testimony is insufficient if it fails to present evidence as to the Rule 1.04 factors on which the fee claimant relies. *See Mercier*, 214 S.W.3d at 776-77. In *Mercier*, a sworn account action decided on summary judgment, the successful plaintiff's counsel submitted affidavit testimony detailing the pleadings he had filed in the case and stating that a fee of one-third the amount recovered would be reasonable. *See id.* at 777. The affidavit did not contain any testimony as to the actual contract or fee arrangement with the plaintiff, the amount plaintiff had paid, or the number of hours expended by counsel. *See id.* The court found that, absent direct evidence of a contingency fee contract, the attorney's implication that the case was handled on contingency was "questionable," and without evidence of other Rule 1.04 factors, the implied assertion that the plaintiff had agreed to pay a "reasonable" fee was not enough to demonstrate that a one-third fee was reasonable. *See id.* at 778.

2. Whether timesheets must be introduced

Although timesheets or other detailed calculations of hours spent on a matter are often used to support testimony as to attorney's fees, they are not required so long as the testimony regarding the hours of work required is not speculative. *See Twin City Fire Ins. Co.*, 223 S.W.3d at 772 (trial counsel's testimony, which included estimates of time spent on various tasks rather than being based on contemporaneously-kept time records, was rationally connected to her personal knowledge because it was based on "her notes and past experience in performing similar work"; lack of detailed time records did not create an "impermissible analytical gap" between the facts and the opinion of the attorney's fee expert relying on them); *In re M.A.N.M.*, 231 S.W.3d at 567-68 ("[T]here is no rigid requirement that there must be evidence on both [the hourly rate and the number of hours spent on the case] to make a determination of attorney's fees.").

When timesheets are introduced, the fact that they are redacted to remove descriptions of services provided does not render them insufficient if the introducing party also offers testimony as to the necessity of legal services. *See Diamond v. Soucie*, 239 S.W.3d 428, 432

(Tex. App.—Dallas 2007, no pet. h.) (redacted timesheets, together with clear, direct, and uncontroverted testimony of counsel that his fees were reasonable, customary, and necessary, were sufficient evidence of fees where opponent did not object to redactions until trial and did not cross-examine on the issue of necessity).

3. Effect of uncontroverted testimony

When a party establishes a reasonable amount of attorney's fees through the clear, direct, and uncontroverted testimony of its counsel, the trial court abuses its discretion by not awarding any attorney's fees. *See Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990) (finding this exception to the interested-witness rule "especially true" when the "opposing party has the means or opportunity" to disprove the testimony). The *Ragsdale* rule is an exception to the general rule that the testimony of an interested witness raises no more than a fact issue to be determined by the jury. *See id.* The uncontroverted testimony of an interested witness will establish that attorney's fees sought are reasonable and necessary as a matter of law, thus authorizing rendition by an appellate court, only if the following conditions exist: (1) the testimony could readily be contradicted if untrue; (2) the testimony is clear, direct, and positive; and (3) there are no circumstances that tend to discredit or impeach the testimony. *Ragsdale*, 801 S.W.2d at 882; *McMillin v. State Farm Lloyds*, 180 S.W.3d 183, 210-11 (Tex. App.—Austin 2005, pet. denied) (reversing and remanding a zero-fee jury award as being based on legally insufficient evidence; reasonable fee amount was controverted, but both experts agreed that some substantial amount of fees was reasonable and necessary); *Hubbard*, 76 S.W.3d at 786 (citing *Lofton v. Tex. Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989)).

The courts of appeals continue to apply the *Ragsdale* rule, both to reverse trial court refusals to award fees, and to affirm fee awards where an opponent fails to controvert a claimant's testimony on fees. *See Hunsucker v. Fustok*, 238 S.W.3d 421, 432 (Tex. App.—Houston [1st Dist.] 2007, no pet. h.) (modifying the trial court's attorney fee award to include an award of appellate fees because appellee filed an uncontroverted affidavit at trial swearing to reasonable fees anticipated on appeal; the

amount requested for appellate fees was clear, direct, positive, and could have been readily controverted if the amount was not reasonable, thus establishing the amount as a matter of law); *Hoelscher v. Kilman*, No. 03-04-00440-CV, 2006 WL 358238, *5 (Tex. App.—Austin Feb. 16, 2006, no pet.) (finding the trial court abused its discretion by not awarding appellate attorney’s fees under CPRC section 38.001, when defendant’s attorney’s testimony as to reasonable appellate attorney’s fees was not controverted); *Hernandez*, 201 S.W.3d at 778 (reversing trial court award of \$10,000 in fees when uncontroverted testimony had been that \$21,000 in fees was reasonable and necessary; closest defendant came to controverting plaintiff’s attorney’s fees evidence was inquiring on cross examination whether any of the plaintiff’s counsel’s work had been “premature”).

4. Where claimant testifies that multiple methods of calculating fees would be reasonable, testimony is not uncontroverted under *Ragsdale*

A party cannot claim the protection of the *Ragsdale* rule as to one basis for a fee calculation when its own supporting testimony contains multiple competing bases for a reasonable fee. *See Rosenblatt v. Freedom Life Ins. Co. of America*, No. 01-05-01107-CV, 2007 WL 2215157, *5 (Tex. App.—Houston [1st Dist.] Aug. 2, 2007); *Tex. Mut. Ins. Co. v. Ray Ferguson Interests, Inc.*, No. 01-02-00807-CV, 2006 WL 648834, at *13-14 (Tex. App.—Houston [1st Dist.] Mar. 16, 2006, pet. denied) (mem. op.).

In *Ray Ferguson Interests*, the fee claimant’s counsel testified without opposition at trial as to two possible measures of fees and could not be heard to complain when the lower measure was awarded. *See Ray Ferguson Interests*, 2006 WL 648834 at *12. Counsel had testified that he had been retained under a 40% contingent fee contract, which he testified was reasonable for the type of case at issue. Then, perhaps to corroborate the reasonableness of the 40% fee, he testified that 40% of the damages his client sought would closely approximate the fee for the case if it had been charged on an hourly-fee basis, which he proved through testimony as to the hours expended on the case, his firm’s standard hourly rates, and the difficulty of the

case. *See id.* On the stand, counsel testified that either fee measure—a contingent fee or hourly fees—would result in a reasonable and necessary fee. *See id.* The jury, which awarded significantly lower damages than plaintiff had requested, found fees in an amount that was roughly 40% of the lower damages awarded. *See id.* at *13. The appeals court overruled the claimant’s request for fees based on the higher hourly-fee basis, finding that there was sufficient evidence to support the jury’s verdict. *See id.* Said the court: “The [fee claimant] cannot tell the jury that it may award fees on either of two bases and then, on appeal, challenge the fees that the jury awarded on the ground that the jury chose one of the bases that the [claimant] itself suggested.” *See id.* at *14.

The result was harsher still in *Rosenblatt*. In that case over unpaid insurance benefits and alleged unfair settlement practices, the jury awarded the plaintiff a small amount of actual damages and zero attorney’s fees. *See Rosenblatt*, 2007 WL 2215157 at *1. Counsel had testified without opposition at trial as to her total hours worked and her hourly rate (which produced a fee of approximately \$300,000), and the terms of her contingency fee contract (which produced a fee of approximately \$500,000 based on the damages sought). On appeal, the fee claimant asserted that the reasonableness and necessity of the fees sought had been uncontroverted and thus conclusively demonstrated. The court held that because the fee claimant had presented evidence that fees of two different amounts calculated on two different bases would be reasonable and that the jury could rely on either calculation, that party could not argue on appeal that the evidence attesting to the reasonableness of the higher amount was uncontroverted. *See id.* at *5. By providing alternatives to the fee amount she opined was reasonable, counsel had controverted her own testimony. *Id.*

In addition to finding her testimony controverted, the *Rosenblatt* court found that counsel’s testimony was not clear, positive, and direct. *Id.* The court found that counsel’s testimony contained inconsistencies, estimates, and equivocation, and therefore did not result in clear, positive, and direct testimony. *See id.* at *5-6 (counsel acknowledged her figures were estimates, invited jurors to calculate a reasonable fee because she refused to add up the component

amounts for the jury, admitted that only some of her time recordings were entered contemporaneously and the rest constructed from estimates, and failed to provide any evidence concerning the necessity of her work.). Because counsel's testimony failed to conclusively establish reasonable attorney's fees as a matter of law, her testimony only raised a triable issue of fact. *Id.* As a result, the appeals court had no choice but to affirm the zero-fee award, because the fee claimant had sought rendition of a fee award, not remand. *Rosenblatt*, 2007 WL 2215157 at *7; *see also Mercier*, 214 S.W.3d at 776-77 (remanding fee award where plaintiff's counsel had presented only "controverted and questionable" testimony implying the existence of a contingency fee contract that had not been documented before the court).

5. CPRC Chapter 18 Affidavit

Chapter 18 of the Civil Practice and Remedies Code, a statute of general application in civil actions, permits a person to submit affidavit testimony as to the reasonableness or necessity of fees for services rendered. *See* TEX. CIV. PRAC. & REM. CODE § 18.001 (a), (b). Under the statute, a party files and serves an affidavit containing the required elements of proof at least thirty days before the first day on which evidence is presented at trial. *See id.* § 18.001(d). Any party intending to controvert the affidavit has a limited amount of time to file and serve a counter-affidavit. *See id.* § 18.001(e). If the initial affidavit is uncontroverted, it is deemed sufficient evidence to support a fact finding of reasonableness or necessity. *See id.* § 18.001(b).

Though Chapter 18 does not specifically address proof of attorney's fees, a Chapter 18 affidavit was credited as factually sufficient evidence of reasonable fees in *Hunsucker v. Fustok*. *See Hunsucker*, 238 S.W.3d at 432. In *Hunsucker*, the physician defendant's counsel submitted an affidavit as to the attorney's fees that had already been incurred and as to the reasonable attorney's fees anticipated on appeal. *See id.* The opposing party never filed a counter-affidavit, and accordingly, the affidavit as to the amount of attorney's fees was presumed reasonable under Section 18.001. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE § 18.001. In addition to not filing a counter-affidavit, plaintiff did not

present any evidence challenging the reasonableness of the fees defendant claimed. *Id.* The district court awarded fees for work done at the trial court level but denied any fees for the appeal. The appeals court reversed, finding that the affidavit testimony as to the amount requested for appellate attorney's fees was clear, direct, and positive, and that it could have been readily controverted if the amount were not reasonable. *Id.* Accordingly, the appeals court held, although the trial court had discretion to grant less than the requested amount of fees, it abused its discretion in awarding no attorney's fees for the appeal. *Id.*

6. Judicial notice

Under Civil Practice & Remedies Code § 38.004, a trial court may take judicial notice of the "usual and customary attorney's fees and of the contents of the case file" without receiving further evidence. *See* TEX. CIV. PRAC. & REM. CODE § 38.004. The statute applies both in bench trials and in jury trials in which the amount of attorney's fees is submitted to the court by agreement. *See id.* Once the "usual and customary" fee is proven (through judicial notice or another means), that fee is presumptively—though rebuttably—deemed reasonable. *See id.* § 38.003.

As a means of proof, however, judicial notice under § 38.004 is limited to actions under Chapter 38 of the Civil Practice and Remedies Code. *See Ahrenhold v. Sanchez*, 229 S.W.3d 541, 544 (Tex. App.—Dallas 2007, no pet.). In *Ahrenhold*, plaintiff specifically sought attorney's fees under a support and maintenance agreement, not under Chapter 38. *Id.* Because plaintiff did not request attorney's fees pursuant to § 38.001, the court of appeals affirmed the trial court's decision not to take judicial notice under § 38.004. *Id.*; *see also Dilston House*, 230 S.W.3d at 719 (where condominium association sought fees under Uniform Property Code, it could not complain that trial court failed to take judicial notice under Chapter 38).

Similarly, practitioners should observe that the Chapter 38 fee provisions do not apply to certain kinds of insurance policies, *see* TEX. CIV. PRAC. & REM. CODE § 38.006, and as such, judicial notice may not be available as to fees in such matters.

When reviewing an award of fees in the absence of specific relevant fact findings, a court of appeals may presume in an appropriate case that the trial court took judicial notice of usual and customary attorney's fees under section 38.004 because the section explicitly informs litigants that a trial court may do so. *Cox v. Wilkins*, No. 03-05-00110-CV, 2006 WL 821202, *7 (Tex. App.—Austin Mar. 31, 2006, pet. denied) (mem. op.) (overruling appellants due process argument challenging the trial court's failure to inform the parties it was taking judicial notice of usual and customary attorney's fees).

C. Segregation of fees

1. When segregation is required

The Texas Supreme Court clarified the law regarding when segregation of fees is required in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

The long-standing rule of Texas law held that, because Texas law does not allow recovery of attorney's fees absent statutory or contractual authorization, a claimant seeking fees must segregate its fees incurred as between those claims that support fee recovery and those that do not. *See id.* at 310-11. The Texas Supreme Court had, however, recognized an exception to this rule in *Stewart Title Guaranty v. Sterling*, 822 S.W.2d 1 (Tex. 1991). The *Sterling* rule stated that segregation was not required when services were rendered "in connection with claims arising out of the same transaction and [that] are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts." *See Sterling*, 822 S.W.2d at 11.

The Supreme Court observed that the *Sterling* exception "threatened to swallow the [segregation] rule," as the appeals courts had been "flooded with claims that recoverable and unrecoverable fees are inextricably intertwined." *See Chapa*, 212 S.W.3d at 311-12. The court further expressed concern that the *Sterling* standard had been inconsistently applied as between the various appellate courts, both as to the extent of the interrelationship required to clear the *Sterling* threshold and as to the method of demonstrating that interrelationship. *See id.* at 312-13. The Supreme Court concluded that *Sterling* "went too far" in stating that common underlying facts necessarily made claims

"inseparable" for attorney's fees purposes, because even factual commonality does not mean that two claims "required the same research, discovery, proof, or legal expertise." *See id.* at 313.

The Supreme Court therefore shifted the focus away from the relationship between the facts underlying two claims and shifted it toward the relationship of particular legal services to the various claims. As the court held:

Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify *Sterling* to that extent.

See id. at 313-14.

In other words, legal work that would be necessary to pursue a recoverable claim remains recoverable, and need not be segregated, even if that work will also assist in the pursuit of non-recoverable claims. As examples, the Supreme Court noted requests for disclosures, proof of background facts, and voir dire as legal services that would be required and incurred on any recoverable claim alone, and the fees for which are thus recoverable regardless of the presence of nonrecoverable claims in the case. *See id.* at 313.

But "if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees." *See id.* Hence, the drafting of the pleadings or jury charge on a tort issue, or putting on proof that goes to exemplary damages—being discrete services that relate only to an unrecoverable-fee claim—may not support the recovery of fees. *See id.* The existence of such fees, therefore, requires segregation. *See id.* (requiring segregation where preparation of pleadings on fraud and preparation and presentation of proof on the defendants' net worth were not required to advance plaintiff's contract and DTPA claims arising out of a vehicle sale).

Importantly, the Supreme Court held that if there are unrecoverable fees, they are not "rendered recoverable merely because they are nominal."

See id. As such, in any matter that includes non-compensable claims, segregation will be required even if the proof would show that the vast majority of fees relate to recoverable-fee claims.

Chapa's segregation requirement has been applied in the following other recent cases:

- A real estate vendor that sued a buyer to recover the balance due on a purchase note was entitled to recover its fees to defend the debtor's counterclaim that the land conveyed was short acreage, because the counterclaim was a defense to recovery on the main action. The vendor was not, however, entitled to recover fees associated with a subsequently-added claim against the title insurer in the transaction, which was not necessary to collect on the note. *See Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam).

- The Texas Supreme Court reversed an award of attorney's fees and remanded for a new trial where the plaintiff pled and obtained jury verdicts on a breach of contract theory as well as five separate tort theories, but failed to segregate fees as between the six causes of action. *See A.G. Edwards & Sons, Inc. v. Beyer*, 235 S.W.3d 704, 710 (Tex. 2007) (plaintiff elected to recover on breach of contract rather than tort causes of action where broker failed to add her as joint owner of her father's brokerage account prior to his incapacity and death).

- The Fourteenth Court of Appeals reversed and remanded an attorney's fee award where the plaintiff failed to segregate fees as between a breach of contract claim and an implied warranty of suitability claim. *See 7979 Airport Garage, L.L.C. v. Dollar Rent A Car Systems, Inc.*, No. 14-05-00484-CV, 2007 WL 1732223, *15-16 (Tex. App.—Houston [14th Dist.] Apr. 27, 2007, no pet. h.). The plaintiff lessee had failed to segregate fees incurred as to its breach of contract claim, its implied warranty claim, and its defense of the lessor's counterclaims. *See id.* at *13-14. The appeals court, noting that the claims and counterclaims depended on the same essential facts, documents, witnesses, and evidence, concluded that fees did not need to be segregated as between the contract claim and the counterclaim. *See id.* at *15. The plaintiff lessee was required, however, to segregate its fees related to the

breach of warranty action, which the lessee had not contended was a claim for an oral or written contract that would give rise to Chapter 38 fee recovery. *See id.* Finding that the evidence as to the total amount of fees incurred was at least some evidence of what the reasonable segregated fee would have been, the court remanded for a new trial on attorney's fees. *See id.* at *16.

2. Manner and sufficiency of segregation

The Texas Supreme Court made it clear that the *Chapa* rule does not require attorneys to keep separate time sheets for their recoverable-fee and unrecoverable-fee work. *See Chapa*, 212 S.W.3d at 314. Rather, a fee claimant may submit an opinion as to the percentage of time spent on a given task that would have been necessary even in the absence of the unrecoverable-fee claim. *See id.*

Even if the absence of segregation, proof of unsegregated fees is some evidence of proper segregated fees; hence, if a party fails to segregate fees, remand is required. *See Chapa*, 212 S.W.3d at 314; *7979 Airport Garage*, 2007 WL 1732223 at *16.

However, the failure to prove the specific segregation of recoverable from unrecoverable fees does not require reversal if the record evidence demonstrates that the attorney's write-offs and discounts attributable to the unrecoverable-fee claims, together with any reductions in the fee award made by the trial court, exceed the amount of fees that would have been attributable to the unrecoverable-fee claim. *See Diamond*, 239 S.W.3d at 432-33.

D. Must establish trial and appellate fees separately

A trial court's award of attorney's fees may include appellate attorney's fees, but "there must be evidence of the reasonableness of the fees pertaining to the appellate work, and the trial court must condition the award of attorneys' fees to an appellee upon the appellant's unsuccessful appeal." *See Walker*, 228 S.W.3d at 409 (citing *Jones v. American Airlines, Inc.*, 131 S.W.3d 261, 271 (Tex. App.—Fort Worth 2004, no pet.)).

To recover appellate fees and post-judgment fees, a party must prove those fees up in the initial trial. See *Varner v. Cardenas*, 218 S.W.3d 68, 69-70 (Tex. 2007) (per curiam) (where party failed to submit evidence of post-judgment foreclosure costs or appeal at trial, it could not newly seek recovery of those fees after appeal on remand).

III. SPECIFIC TYPES OF CLAIMS

Correctly identifying the basis for recovering fees is crucial both to proving an entitlement to fees and to preserving error when fees are denied. When a party pleads a specific ground for recovery of attorney's fees, the party is limited to that ground and cannot recover attorney's fees on another, unpled ground. See *Kreighbaum v. Lester*, No. 05-06-01333-CV, 2007 WL 1829729, *2-3 (Tex. App.—Dallas June 27, 2007, no pet. h.) (because appellants' counterclaim specifically requested attorney's fees under section 17.50(c) of the Business and Commerce Code, appellant could not seek fees on another basis in reliance on a prayer for relief containing a nonspecific request for attorney's fees).

Below, we address recent cases on specific grounds for fee recovery:

A. CPRC Chapter 38 Recovery

1. Types of actions covered

Under section 38.001 of the Civil Practice and Remedies Code, 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 § 38.001.

Recently, the Dallas Court of Appeals held that a party cannot recover attorney's fees under a breach of express warranty claim pursuant to section 38.001(8) because express warranty claims are distinct from breach of contract claims. *Carlisle Corp. v. Medical City Dallas, Ltd.*, 196 S.W.3d 855 (Tex. App.—Dallas 2006, review granted); see also *Harris Packaging Corp. v. Baker Concrete Const. Co.*, 982 S.W.2d 62, 69 (Tex. App.—Houston [1 Dist.] 1998 pet. denied) (overruling arguments that an express warranty is merely a function of a contract, and therefore should fall within TEX. CIV. PRAC. & REM CODE § 38.001); cf. *7979 Airport Garage*, 2007 WL 1732223 at *15 (stating in dictum that the implied warranty of suitability with respect to a property lease does not independently qualify for Chapter 38 recovery, but collecting contrary authority and stating that the court was “mindful of the large body of case law stating that an implied warranty becomes part of the terms of a contract”).

The *Carlisle* court relied in large part on a 1991 supreme court case, *Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991), in which the supreme court observed that the remedies and elements of warranty and contract claims differ, and that while certain warranty claims are actionable under the Deceptive Trade Practices Act, ordinary breaches of contract are not. See *Carlisle*, 196 S.W.3d at 869 (citing *Southwestern Bell Telephone Co.*, 811 S.W.2d at 576). The *Carlisle* court, citing U.C.C. commentary to the effect that the U.C.C. does not interfere with common law doctrines enlarging warranty law beyond the scope of contractual privity, distinguished cases holding that warranties necessarily arise out of contracts. See *id.* (citing TEX. BUS. & COM. CODE ANN. § 2.313 cmt. 2; distinguishing *Coca Cola Bottling Co. v. Enas*, 164 S.W.2d 855, 857 (Tex. Civ. App.—Amarillo 1942, writ ref'd w.o.m.) (“[I]t is established law that no warranty, whether expressed or implied, can be created except by, or as the result of, a contract.”); *Coca-Cola Bottling Co. v. Smith*, 97 S.W.2d 761, 766 (Tex. Civ. App.—Fort Worth 1936, no writ) (“We recognize the universal rule that a warranty, either express or implied, must grow out of contractual relations between the parties.”)).

The Texas Supreme Court has granted review of the *Carlisle* case. The petitioner argues that courts routinely award Chapter 38 attorney's fees as to causes of action other than contract where those causes of action are grounded in contract or involve the interpretation of a contract, such as promissory estoppel, conversion, negligence, and fraud. See Petitioner's Brief at 15-20, *Medical City Dallas Ltd. v. Carlisle Corp.*, No. 06-0660 (Tex. Feb. 16, 2007). The supreme court heard argument in October and, as of this writing, the case remains pending.

2. Elements of recovery

To recover attorney's fees under section 38.001, a party must (1) prevail on a cause of action for which attorneys fees are recoverable, and (2) recover damages. See *Imperial Lofts, Ltd. v. Imperial Woodworks, Inc.*, 2007 WL 4157245, *4 (Tex. App.—Waco Nov. 7, 2007, no pet. h.) (citing *Green Intl., Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex.1997)).

3. Whether a net recovery is required to prevail

A prevailing plaintiff can satisfy the damage recovery element of Chapter 38 without obtaining a net recovery, provided that the zero recovery results from offsetting claims. *McKinley v. Drozd*, 685 S.W.2d 7, 10-11 (Tex. 1985) (party was entitled to attorney's fees for successful breach of contract claim even though damages were offset by opposing party's counterclaim on a separate contract).

However, the "no-net-recovery" exception to the damages recovery element does not apply when the damages awarded by the jury are offset by settlement credits or insurance payment credits. See *Imperial Lofts*, 2007 WL 4157245 at *4. In *Imperial Lofts*, the jury awarded damages to the plaintiff, but because the settlement credits and insurance payment offsets exceeded the jury's damage award, the court held that the plaintiff was not the prevailing party and was not entitled to recover his attorneys' fees. *Id.* at *4-5 (citing *Blizzard v. Nationwide Mut. Fire Ins. Co.*, 756 S.W.2d 801, 806-07 (Tex. App.—Dallas 1988, no writ) ("It is one thing to allow a party an award of attorney fees on a successful claim notwithstanding an opposing party's success on an offsetting claim. It is quite another to allow

attorney fees on a claim which, although successful, was paid in full before trial."); *Fire Ins. Exch. v. Sullivan*, 192 S.W.3d 99, 109-10 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (homeowner was not entitled to recover attorney's fees under Chapter 38 because the amount that insurer had paid on the homeowner's claims before suit exceeded the amount homeowner was entitled to receive under judgment rendered by the appellate court on the jury's verdict)).

4. Presentment requirement

To recover attorney's fees under Chapter 38, "the claimant must be represented by an attorney," he or she "must present the claim to the opposing party," and "payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented." TEX. CIV. PRAC. & REM. CODE § 38.002(1)-(3). The purpose of the presentment requirement is to allow the person against whom the claim is asserted an opportunity to pay the claim within thirty days after notice without incurring an obligation for attorney's fees. See *Testarossa Motors, Inc. v. Tinsley*, No. 04-06-00350-CV, 2007 WL 120649, *1 (Tex. App.—San Antonio Jan. 19, 2007, no pet. h.) (citing *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981)). The presentment requirement does not require that the claimant send a formal demand letter; oral and written demands can be sufficient. See *id.* In *Testarossa*, the plaintiff satisfied the presentment requirement when his attorney sent a notice of claim letter to defendant's attorney approximately sixty days before trial. See *id.* at *2.

A claimant's demand satisfies the presentment requirement even if greater than the amount of damages ultimately found by the jury, provided that the claimant's demand is not "excessive." See *Hernandez v. Lautensack*, 201 S.W.3d 771, 777 (Tex. App.—Fort Worth 2006, pet. denied). A demand is "excessive" if the claimant acts unreasonably or in bad faith, as by refusing a tender of the amount actually due or clearly indicating that the claimant would refuse a proper tender. See *id.* In *Hernandez*, the plaintiff homeowner demanded approximately \$40,000 from a roofing contractor for the contractor's faulty replacement work, and the jury found approximately \$25,000 in actual

damages. The jury found the demand excessive, but the trial court disregarded the jury's finding and awarded fees. The appeals court affirmed, observing that there was no record evidence that the contractor had tendered the amount of actual damages, that any tender had been refused, or that the homeowner gave any indication he would refuse tender. *See id.* at 777-78.

5. UIM claims not “presented” until motorist’s liability established

A recent Texas Supreme Court decision regarding the presentment requirement may sharply limit the availability of attorney’s fees in underinsured motorist (UIM) coverage cases.

The plaintiffs in *Brainard v. Trinity Universal Insurance Co.*, 216 S.W.3d 809 (Tex. 2006), survivors of the victim of a fatal auto accident, sued the owner/employer of the other vehicle for wrongful death. While the wrongful death suit was pending, the plaintiffs sought UIM benefits from the victim’s UIM insurer; when the UIM insurer failed to tender coverage, the plaintiffs added the UIM insurer as a defendant in the wrongful death suit. The plaintiffs settled with the owner/employer of the other vehicle for that defendant’s policy limits, and proceeded to trial against the UIM insurer for breach of the UIM contract. The jury found that the other driver’s negligence had caused the accident and found damages slightly exceeding the amount for which the driver’s insurance company had settled. The trial court credited the settlement against the jury’s damages verdict, awarded the difference as damages against the UIM insurer, and awarded attorney’s fees under Chapter 38. *See id.* at 811-12. The UIM insurer challenged the award of attorney’s fees on the grounds that the “presentment” requirement had not been satisfied. *See id.* at 818.

The Texas Supreme Court held that “presentment” of a UIM claim does not occur until a judgment is rendered determining the liability and underinsured status of the underinsured third party. *See id.* at 819. The supreme court noted that to allow a party a reasonable opportunity to pay a claim without incurring an obligation to pay attorney’s fees, Chapter 38 provides for the recovery of fees only if the claim has gone unpaid for thirty days after “the claim is presented.” *See id.* at 818 (citing TEX. CIV. PRAC. & REM. CODE §

38.002(3)). Reasoning that “the existence of a duty or obligation which the opposing party has failed to meet” is an “essential element” of Chapter 38 recovery in a contract suit, and concluding that a UIM insurer has no duty or obligation to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist, *see id.* (citing *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652, 653-54 (Tex. 2000)), the supreme court held that “a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist,” *see id.*

Therefore, in cases where the UIM insured settles with the underinsured tortfeasor-motorist in advance of trial, the UIM insured must litigate UIM coverage against the insurer and obtain the required findings before a Chapter 38 fee claim can arise. *See id.* So long as the insurer pays any UIM coverage within thirty days of the judgment in that coverage case, it cannot be held liable for attorney’s fees. *See id.* The supreme court held similarly in two more cases decided the same day. *State Farm Mut. Auto. Ins. Co. v. Nickerson*, 216 S.W.3d 823 (Tex. 2006) (reversing award of attorney’s fees incurred during trial on grounds that UIM insured “had no claim to present before the trial court rendered judgment”); *State Farm Mut. Auto. Ins. Co. v. Norris*, 216 S.W.3d 819, 822-23 (Tex. 2006) (plaintiff “could not seek attorney’s fees until, at the earliest, thirty days after the trial court rendered judgment assuming that State Farm refused to pay the amount due under the UIM contract”).

B. Contract providing for recovery of fees and expenses

1. General rule permitting recoverability of contractually-provided fees

In Texas, parties to a contract may provide by agreement that the prevailing party is entitled to recover attorney’s fees. *Probus Properties v. Kirby*, 200 S.W.3d 258, 265 (Tex. App.—Dallas 2006, no pet. h.) (citing *Weng Enters. v. Embassy World Travel*, 837 S.W.2d 217, 222-23 (Tex. App.—Houston [1st Dist.] 1992, no writ) (finding successful defendant-appellant entitled to attorney’s fees under lease agreement).

2. Effect of partial invalidity of contract

A contractual right to recover attorney's fees will survive a finding that a contract is partially invalid only if the invalid portion of the contract is severable from the remainder. *See Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, No. 01-05-010800-CV, 2007 WL 1299661, *19-21 (Tex. App.—Houston [1st Dist.] May 3, 2007, pet. filed). In *Hardy*, the trial court, having invalidated a non-compete clause in an employment contract, held that the provision of the employment contract providing for attorney's fees was also unenforceable. *Id.* at *3. The appellate court, reviewing *de novo* the question of law as to severability, held that the non-compete clause was severable from the still-enforceable remainder of the contract. *Id.* at *19. Accordingly, the appeals court held, the trial court erred in not awarding attorney's fees under the terms of the contract. *Id.* at *21.

C. Uniform Declaratory Judgments Act

The Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE §§ 37.001-.011, provides that in any proceeding the court “may award costs and reasonable and necessary attorney's fees as are equitable and just.” *See* TEX. CIV. PRAC. & REM. CODE § 37.009.

1. Award of fees under UDJA is discretionary; no prevailing party requirement

A trial court's judgment regarding the award of attorney's fees under the Uniform Declaratory Judgments Act will not be reversed on appeal absent a clear showing that the trial court abused its discretion. *Neeley v. West Orange-Cove Consolidated Independent School Dist.*, 228 S.W.3d 864, 868 (Tex. App.—Austin 2007, pet. denied); *James v. Krown*, 218 S.W.3d 746, 750 (Tex. App.—Fort Worth 2007, pet. denied); *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Dist.*, 198 S.W.3d 300, 318-19 (Tex. App.—Texarkana 2006, pet. denied) (“A prevailing party in a declaratory judgment action is not entitled to attorney's fees simply as a matter of law; entitlement depends on what is equitable and just, and the trial court's power is, in that respect, discretionary.”); *Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998).

An award of attorneys' fees in a declaratory judgment action is “not dependent on a finding that a party substantially prevailed.” *See Neeley*, 228 S.W.3d at 868 (quoting *Barshop v. Medina County Underground Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996)).

In *Neeley*, a case challenging the constitutionality of Texas' school-finance system, the trial court awarded attorneys' fees to each of the plaintiff school districts, including those who had pursued only unsuccessful claims in the litigation. *See Neeley*, 228 S.W.3d at 865. The State argued the trial court abused its discretion in awarding fees to those plaintiff school districts who had not prevailed on any claims. *Id.* at 868. The appellate court, observing that each of the plaintiff school districts had made significant contributions to the case, including by presenting substantial and complex data that proved “essential to the litigation as a whole, including the claim that ultimately prevailed,” upheld the award as being within the discretion of the trial court. *Id.* The State also argued that the award of fees to the plaintiff school district should be offset by the State's fees related to claims on which the State prevailed. *Id.* The court of appeals rejected this argument, noting that the State cited no authority for the proposition. *Id.* In addition, the court emphasized that while the trial court is free to consider the relative success of the parties when determining an award of attorney's fees in a declaratory judgment action, whether or not a party prevails on its claim is not the determinative factor in the decision. *Id.* at 869.

Likewise, a court has discretion to decline to award fees to a prevailing party in a declaratory judgment action. *Hardy v. Mann Frankfort Stein & Lipp Advisors, Inc.*, No. 01-05-010800-CV, 2007 WL 1299661, *15-16 (Tex. App.—Houston [1st Dist.] May 3, 2007, pet. filed). In *Hardy*, the trial court denied the prevailing plaintiff's request for attorney's fees, stating at the hearing on plaintiff's motion for attorney's fees and costs that he had never before awarded attorney's fees in a declaratory judgment action. *Id.* On appeal, the fee claimant contended that the trial court had acted arbitrarily in denying fees on that basis. The appeals court disregarded the statement, which had not been made as a formal finding of fact or conclusion of law, as not being equivalent to a statement by the court that it would not award such fees in a proper

case. *See id.* at *17. The appeals court upheld the denial of fees, recognizing (in the absence of findings and conclusions) that the record would have supported a conclusion that the defendant, although unsuccessful at trial, had taken its litigation position (involving a covenant not to compete) to protect legitimate commercial interests. The appeals court therefore found that Hardy failed to make a “clear showing” that the trial court abused its discretion. *See id.*

2. Requirement that fees be “equitable and just”

When a party impleads a third party into a declaratory judgment action, it cannot thereafter assert that the third party’s costs of defending that action were unnecessarily incurred and therefore not “equitable and just” within the meaning of the UDJA. *See State and County Mutual Fire Insurance Co. v. Walker*, 228 S.W.3d 404, 412 (Tex. App.—Fort Worth 2007, no pet. h.). In *Walker*, an insurer sued its insured for a declaration that the insured’s policy was void, and joined in the suit a wrongful death plaintiff who had sued the insured. *Id.* at 411. After the wrongful death plaintiff incurred fees defending the declaratory action, the insurer nonsuited the wrongful death plaintiff and eventually won summary judgment against the insured, voiding the policy. The trial court, however, awarded the wrongful death plaintiff its fees for having been forced to defend the action when she had not been a proper party to the action. On appeal, the insurer argued that the wrongful death plaintiff’s fees were not equitable and just based on the trial court’s finding that the wrongful death plaintiff was not a proper party. *Id.* at 412. The Fort Worth Court of Appeals upheld the fees as equitable and just because the wrongful death plaintiff had to incur the fees in order to protect her rights by responding in the action. *Id.* Additionally, the court said that by joining the wrongful death plaintiff in the declaratory judgment action, the insurer waived any argument that the wrongful death plaintiff did not have standing to be heard on the declaratory judgment issues. *Id.*

3. Attorney’s fee claim is not sufficient to create jurisdiction to hear a declaratory judgment action

A request for attorney’s fees under the Declaratory Judgment Act does not vest

jurisdiction in a district court; jurisdiction over the underlying substantive controversy must exist independently. *See In re Southwestern Bell Telephone Co., L.P.*, 235 S.W.3d 619, 626 (Tex. 2007) (because Public Utilities Commission had exclusive jurisdiction over plaintiffs’ request for declaration that telephone company had improperly charged universal service fund fees, plaintiffs’ request for attorney’s fees under UDJA “cannot operate to vest the trial court with jurisdiction where there was none before”).

The Declaratory Judgments Act cannot be coupled with another action for the sole purpose of seeking attorney’s fees not otherwise available. *See Aaron Rents, Inc. v. Travis Central Appraisal Dist.*, 212 S.W.3d 665 (Tex. App.—Austin 2006, no pet.) (relief denied where the requested declaratory relief was redundant to the relief sought under the tax code, with the exception of a request for attorney’s fees); *Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 490 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (finding that a trial court abuses its discretion in awarding attorney’s fees under the UDJA if the claim for declaratory relief is brought solely for the purpose of obtaining attorney’s fees); *Durham Transp. Co., Inc. v. Beettner*, 201 S.W.3d 859, 873 (Tex. App.—Waco 2006, pet. denied) (finding that appellees’ constitutional claims could have easily been raised with their request for prejudgment and post-judgment interest; because it was not necessary to bring a separate claim for declaratory relief, the award was an abuse of discretion).

D. Other specific statutory provisions addressed in recent cases

1. Prompt pay statute

The Texas Supreme Court held that an insurer that interpleads policy proceeds after receiving adverse bona fide claims is not subject to prompt-pay penalties (comprising interest and attorney’s fees) for the period after it interpleads the funds. *See State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799, 807 (Tex. 2007) (construing TEX. INS. CODE §§ 542.051-.061). Thus, where a life insurer interpleaded the entire policy proceeds owed on the 72nd day after receiving the initial claim, missing the prompt-pay deadline by 12 days, the insurer was liable for penalty interest and attorney’s fees only for

the 12-day late period. *See id.* (reversing award of attorney’s fees and interest for period from date of claim to date of final judgment).

In another case, the Texas Supreme Court held that prompt-pay penalties, including attorney’s fees, may be recovered from a liability insurer that breaches the duty to defend the insured under a commercial general liability policy. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, No. 05-0832, 2007 WL 2459193 (Tex. Aug. 31, 2007) (holding that defense costs under a liability policy constitute first-party claims within the meaning of the prompt-pay statute).

2. Insurance Code § 541 (formerly Article 21.21)

Under Texas Insurance Code section 541.152 (formerly Article 21.21 § 16(b)(1)), a prevailing plaintiff “may obtain . . . the amount of actual damages plus court costs and reasonable and necessary attorneys’ fees.” TEX. INS. CODE §541.152. Although the statute says “may,” a trial court lacks discretion to determine whether to award fees under section 541.152 when a party prevails and recovers damages on Chapter 541 claim. *See Rosenblatt v. Freedom Life Ins. Co. of America*, 2007 WL 2215157, *3 (Tex. App.—Houston [1st Dist.] Aug. 2, 2007, no pet. h.). While a trial court has some discretion in deciding whether to award attorney’s fees when a statute provides the *court* “may award” attorney’s fees, the trial court has no discretion in deciding whether to award fees when a statute provides that a *party* “may recover,” “shall be awarded,” or “is entitled to” attorney’s fees. *Id.* at *3 (citing *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998)). However, the mandatory nature of the fee award does not obviate the claimant’s responsibility to demonstrate that fees are reasonable and necessary. *See id.*

3. Sanctions under Medical Liability and Insurance Improvement Act

Under the Medical Liability Act, if a claimant fails to serve a defendant with an expert report within the statutory period, the trial court shall award the defendant reasonable attorney’s fees and costs. *See* TEX. CIV. PRAC. & REM. CODE § 74.351. This statutory award is mandatory. *See Abilene Diagnostic Clinic v. Downing*, 233 S.W.3d 532, 534 (Tex. App.—Eastland 2007, pet. denied) (reversing and remanding trial

court’s order denying attorney’s fees because an award of attorney’s fees to defendant was mandatory when plaintiff failed to file an expert report within the statutory time period).

4. Texas Securities Act

The Texas Securities Act provides that an aggrieved buyer or seller bringing a Section 33 claim for rescission or damages may also recover reasonable attorney’s fees “if the court finds that the recovery would be equitable in the circumstances.” *See* TEX. REV. CIV. STAT. art. 581-33D(7).

Despite the equitable nature of this inquiry, a putative class representative’s request for attorney’s fees under the Texas Securities Act does not give rise to predominant individual issues if the defendant’s conduct at issue did not vary from class member to class member. *See Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 459-60 (Tex. 2007) (because “the heart of the dispute” as to whether defendant illegally sold unregistered securities concerned the defendant’s “marketing conduct in general,” not conduct “varying from buyer to buyer,” attorney’s fees could be awarded under the TSA on a classwide basis).

E. Counterclaims

The availability of fees for prosecuting or defending a counterclaim depends on whether the counterclaim presents issues that are in substance claims or defenses for which fees would otherwise be available. Hence, as described below, fees are available for defending a counterclaim if doing so is the equivalent of prosecuting a main claim for which fees are recoverable; fees are not available for prosecuting a counterclaim if doing so is simply the equivalent of defending an ordinary claim.

1. If the main claim permits recovery of fees, a party may recover fees for defending a related counterclaim

A real estate vendor that sued a buyer to recover the balance due on a purchase note was entitled to recover its fees to defend the debtor’s counterclaim that the land conveyed was short acreage. *See Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007) (per curiam). The Texas Supreme Court held that the debtor “sought to

reduce the amount collected on the note” by its counterclaim. *See id.* Because the vendor-noteholder “had to overcome this defense” to “collect the full amount” sought, the attorney’s fees incurred on the counterclaim were “necessary to recover on their contract” and were recoverable. *See id.*

A lessee that sued the property owner for the costs of repairs on the property was entitled to recover his fees to defend the property owner’s counterclaims of fraud and breach of contract. *See 7979 Airport Garage*, 2007 WL 1732223, at *13. The appellate court held that by asserting the counterclaims, the landowner “not only sought to recover damages, but also to reduce or avoid liability for [the lessee]’s contract claim.” *Id.* To prevail on a contract claim, a party must overcome any and all affirmative defenses. *Id.* Accordingly, an opposing party who raises affirmative defenses cannot suggest that overcoming those defenses is unnecessary to the plaintiff’s prevailing on the contract claim. *Id.* The appellate court held that by the same token, when the landowner asserted counterclaims that the lessee had to overcome in order to fully recover, the attorneys’ fees necessary to defeat the counterclaims were likewise recoverable. *Id.*

2. “Mirror-image” declaratory judgment counterclaims do not give rise to UDJA fee recovery unless the plaintiff sought UDJA relief

When a party brings a declaratory judgment action by way of a counterclaim or amended petition, and the declaratory judgment involves only “mirror-image” issues already raised by the original claim, the party is not entitled to an award of attorney’s fees. *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Utility Dist.*, 198 S.W.3d 300, 318 (Tex. App.—Texarkana 2006, pet. denied) (citing *Adams v. First Nat’l Bank of Bells/Savoy*, 154 S.W.3d 859, 873 (Tex. App.—Dallas 2005, no pet.)). The reason for this prohibition is to prevent a declaratory relief plea simply to recover otherwise unavailable attorney’s fees. *See id.* (citing *Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 796 S.W.2d 763, 772 (Tex. App.—Dallas 1990, writ denied)).

However, this rule does not apply if the plaintiff seeks declaratory relief under the UDJA in the first instance. In *Save Our Springs*, the plaintiff

environmental group sought a declaration that a municipal utility district had been established in unconstitutional fashion. *See id.* The district, in turn, sought a declaration that it was validly established and sought attorney’s fees. Although the counterclaim raised no new issues, the mirror-image rule did not apply. *See id.* (citing *First City Nat’l Bank of Midland v. Concord Oil Co.*, 808 S.W.2d 133, 138 (Tex. App.—El Paso 1991, no writ)). The district, as a defendant in a UDJA action, was entitled to seek and obtain attorney’s fees, because the UDJA permits *either* party to obtain attorney’s fees, without regard to which party brings the suit. *See id.*; *see also* Section III(D).

F. 42 U.S.C. § 1983 Claims

The Texas Supreme Court held that a nominal damages award in a Section 1983 case “ordinarily will not support attorney fees.” *See County of Dallas v. Wiland*, 216 S.W.3d 344, 358 (Tex. 2007). In *Wiland*, the supreme court affirmed a lower court’s summary judgment holding that three former deputy constables were denied procedural due process when they were terminated without a hearing. *See id.* at 354. However, because no evidence had been presented to the trial court as to the existence *vel non* of just cause for dismissal, the supreme court held that the record did not yet demonstrate that plaintiffs were entitled to anything more than the nominal damages afforded for a deprivation of procedural due process. *See id.* at 357. Therefore, the supreme court reversed and remanded both the issue of compensatory damages and the attorney’s fee award. *See id.* at 358. The court declined to hold “with certainty” that attorney’s fees are improper in a nominal damages case, but cited U.S. Supreme Court precedent for the proposition that a fee award is not reasonable in a Section 1983 case unless compensable injury is proven. *See id.* at 358 & n.61 (quoting *Farrar v. Hobby*, 506 U.S. 103, 115 (1992)).

IV. THE FEE ORDER

A. Judgment must include decretal language ordering payment of fees

To be enforceable, an award of attorney’s fees must be contained in the decretal language of the trial court’s judgment. *Hines v. Villalba*, 231 S.W.3d 550, 553 (Tex. App.—Dallas 2007, no

pet.). In *Hines*, the trial court's judgment ordered the payment of \$15,000 as attorneys' fees stating: "[t]he court orders Defendants ... to pay the sum of \$15,000 as attorney fees." *Id.* The appellate attorney's fees, however, were not included in the decretal language of the judgment; rather, the judgment merely stated "[i]f this cause is unsuccessfully appealed, the defendants attorneys fees to defend against such appeal shall be \$8500." *Id.* Despite the court's stated intention to grant appellate attorney's fees in the case of an unsuccessful appeal, no award was ordered because only the decretal provisions on the judgment control. *Id.*

B. To whom fees should be awarded

An award of attorney's fees is payable to the party, not directly to the counsel. *See Nu-Way Energy Corp. v. Delp*, 205 S.W.3d 667, 684 (Tex. App.—Waco 2006, pet. denied) ("Texas courts have consistently condemned the award of attorney's fees directly to counsel."). Although ordering the payment of fees directly to opposing counsel is error, the party ordered to do so will ordinarily not have standing to complain of the error, "because it is usually 'immaterial' to the party paying" how those fees are handled. *See id.* (quoting *Transp. Ins. Co. v. Franco*, 821 S.W.2d 751, 755 (Tex. App.—Amarillo 1992, writ denied)). Where the party ordered to pay fees is substantively affected, however, it has standing to complain. In *Nu-Way*, the plaintiff was a judgment creditor seeking a turnover order as to certain of the bankrupt debtor's assets. At the trial court level, the debtor successfully contended that the creditor committed a breach a contract by seeking to enforce its judgment against the assets at issue, and the trial court awarded fees payable directly to the debtor's counsel. The appeals court reversed on several grounds, among them that as a judgment creditor, the plaintiff creditor was entitled to an offset of the fee award against the judgment owed it by the debtor; hence, it had standing to challenge the order to pay fees directly to counsel. *See id.*

V. APPEALS

A. Standard of review depends on basis for awarding fees

To determine the correct standard of review for an award of attorney's fees, the court must look

first to the statute authorizing those fees. *See Weber*, 238 S.W.3d at 583; *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998).

Generally, an appellate court reviews a trial court's decision to *grant or deny* attorney's fees under an abuse of discretion standard, and reviews *the amount awarded* as attorney's fees under a legal sufficiency standard. *See Hoelscher v. Kilman*, No. 03-04-00440-CV, 2006 WL 358238, *3-5 (Tex. App.—Austin Feb. 16, 2006, no pet.) (mem. op.) (citing *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 262 (Tex. App.—Austin 2002, pet. granted, judgment vacated w.r.m. by agr.)). Some statutes, however, afford the trial court no discretion to deny an award of fees. *See id.* *3 (citing *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998)). In *Hoelscher*, the appellate court relied on the supreme court's decision in *Bocquet*, in which the supreme court distinguished between discretionary and non-discretionary fee statutes. The court held that statutes providing the court "may" award attorney fees afford the trial court a measure of discretion in deciding whether to award attorney fees or not. *See id.* (citing *Bocquet*, 972 S.W.2d at 20-21). In contrast, statutes providing that a party "may recover", "shall be awarded", or "is entitled to" attorney fees are not discretionary. *See id.* (citing *Bocquet*, 972 S.W.2d at 20). *Cf. Rosenblatt*, 2007 WL 2215157, at *3 (finding that the phrase "may obtain" in TEX. INS. CODE §541.152 creates a mandatory award of attorney's fees).

B. Preserving error

A motion to disregard a jury finding as to attorney's fees does not preserve factual sufficiency error, and hence, will not permit reversal of a judgment based on such a finding unless the appellant demonstrates he is entitled to rendition of a contrary judgment. *Rosenblatt*, 2007 WL 2215157 at *7. In *Rosenblatt*, plaintiff requested attorney's fees of \$500,000, offering his attorney's testimony regarding the reasonableness of the fee amount, but the jury awarded the plaintiff only \$30,000 in actual damages and zero dollars for attorney's fees. *Id.* at *1. Foregoing a motion for new trial, plaintiff filed a motion to disregard the jury's fee award, which was denied. *Id.* Plaintiff appealed, arguing the trial court abused its discretion and was compelled to disregard the jury's zero-fee

finding because plaintiff's counsel's uncontroverted testimony on fees required a fee award as a matter of law under *Ragsdale*. *Id.* at *7. The court of appeals, finding that the testimony at trial did not satisfy the *Ragsdale* test, affirmed the trial court's denial of plaintiff's motion to disregard. Plaintiff, not having preserved any error regarding factual sufficiency, did not request and could not obtain the alternative relief of remand. *Id.*

The Texas Supreme Court held that a motion for new trial as to the factual sufficiency of attorney's fees evidence preserved error where the appellant complained that the jury's fee verdict had been based on the jury's original damages verdict, not on the damages award as reduced by the intermediate appeals court. *See Barker*, 213 S.W.3d at 312-13 (discussed further immediately below).

C. Fee award where underlying damages award is reversed on appeal

Because the jury is to consider the results obtained at trial in arriving at its fee finding, the question arises whether a reduction of the jury's damages award on appeal necessarily requires reversal of the jury's fee finding as well. The Texas Supreme Court has held that it does, unless the appellate court is "reasonably certain that the jury was not significantly influenced by the erroneous amount of damages it considered." *See Barker v. Eckman*, 213 S.W.3d 306, 313-14 (Tex. 2006).

In *Barker*, the jury awarded the plaintiff more than \$100,000 in actual damages for breach of a bailment agreement as well as more than \$200,000 in attorney's fees. On appeal, the Houston court of appeals (1st District) reduced the damages award to approximately \$16,000 based on limitations but left the attorney's fee award intact, and the defendant appealed that decision. The Supreme Court held that the defendant was entitled to a factual sufficiency review of a "jury finding made in consideration of the correct damages amount," and although "[n]ot every appellate adjustment to the damages which a jury considered as results obtained ... will require reversal," the wide disparity present in that case demonstrated harmful error. *See id.* at 314.

Rather than remanding to the appellate court or reducing the fee award proportionately to the damages award, the supreme court remanded to the trial court for a new trial on attorney's fees. *See id.* at 315. The supreme court observed that the appeals court—constrained as it is to review the evidence according to the jury charge given and the jury findings made in response to that charge—was not permitted to substitute its judgment for that of the jury's as to the weight to be placed on the "results obtained" factor in Rule 1.04. *See id.* at 314. Putting the decision back in the hands of the appellate court, either through a new sufficiency review in light of the corrected damages award or through a proportionality method, would effectively require the appellate court to re-balance the *Arthur Andersen* factors (using a damages figure not before the jury) or to presume that the jury used a proportionality method to award fees (though they were not required to do so). *See id.* at 315. As such, a new trial was required. *See id.*

In another matter, the Texas Supreme Court held that the rule adopted in *Barker* as to jury trials also applies to fee findings made by the court. *See Young v. Qualls*, 223 S.W.3d 312, 314-15 (Tex. 2007) (noting that the *Arthur Andersen* factors apply whether fees are awarded by the court or by the jury, and reversing fee finding where supreme court was not "reasonably certain" that the trial court's decision was "not significantly affected" by an erroneous damages finding reduced by two-thirds on appeal).

The Texas Supreme Court has subsequently stated that "the issue of attorney's fees should *ordinarily* be retried" where the appeals court greatly reduces the trial court's damages award, absent reasonable certainty that the jury was not influenced by the damages award. *See Bossier Chrysler-Dodge II, Inc. v. Rauschenberg*, 238 S.W.3d 376 (Tex. Nov. 2, 2007) (per curiam) (emphasis added) (reversing appeals court's judgment affirming trial court's fee award despite 87% reduction in damages award).

See also Part III(F) (describing Texas Supreme Court's reversal of fee award based on reversal of underlying Section 1983 damages award in *Wiland*).

D. Trial court may require security for attorney’s fees award when setting supersedeas bond

When setting an amount for a bond or security pending appeal, the trial court must determine the sum of compensatory damages and interest for the duration of appeal and costs awarded in the judgment. *See Clearview Properties, L.P. v. Property Texas SC One Corp.*, 228 S.W.3d 262, 264 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.). It is proper to include attorney’s fees in the calculation because fees should be considered part of the costs awarded in the judgment. *See id.* at 264 (citing *Williams v. Compressor Eng’g Corp.*, 704 S.W.2d 469, 474 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.)) (noting as an alternative grounds that the contract at issue in the litigation provided for attorney’s fees as compensatory damages).

VI. FEES AS SANCTIONS

A. CPRC Chapter 10 sanctions

Chapter 10 of the Civil Practice and Remedies Code, in conjunction with Rule 13, TEX. R. CIV. P., provides that a court may impose sanctions against attorneys and/or parties for filing frivolous pleadings and motions. *See* TEX. CIV. PRAC. & REM. CODE § 10.001. The statute provides that sanctions, which must be limited to “what is sufficient to deter repetition of the conduct,” may include an order to pay an aggrieved party “reasonable expenses ... including reasonable attorney’s fees.” *See id.* § 10.004(b), (c)(3).

In 2007, the Texas Supreme Court held that courts, in exercising their sound discretion to set the amount of Chapter 10 sanctions, should “begin with an acknowledgment of the costs and fees incurred because of the sanctionable conduct” to serve as a “monetary guidepost of the impact of the conduct on the party seeking sanctions and the burdens on the court system.” *See Low v. Henry*, 221 S.W.3d 609, 620-21 (Tex. 2007). In *Low*, the district court imposed a \$50,000 sanction against an attorney who had filed suit against two physicians for negligent prescription of medications despite his possession of medical records demonstrating that the physicians had not prescribed the medication at issue. The supreme court held

that, where Chapter 10 sanctions are “especially severe,” it is “inadequate” for the court to impose sanctions without “an explanation of how a trial court determined that amount of sanctions.” *See id.* at 620. Trial courts should consider “relevant factors,” including the factors identified by the ABA with respect to Rule 11 sanctions under the Federal Rules of Civil Procedure, but need not address all of those factors in its order. *See id.* at 620-21 (citing AMERICAN BAR ASS’N, STANDARDS AND GUIDELINES FOR PRACTICE UNDER R. 11 OF THE FED. R. CIV. P., *reprinted in* 121 F.R.D. 101, 104 (1988)). Although the supreme court acknowledged that Chapter 10 sanctions are not limited to attorney’s fees and costs, it held that the trial court’s analysis should begin with fees and costs. *See id.* at 621. Because the trial court record did not reveal the basis of the \$50,000 sanction, the supreme court remanded to allow the parties to present evidence responsive to the court’s guidelines. *See id.* at 621-22. Based on the holding in *Low*, practitioners would be wise to introduce evidence and request fact findings as to fees and costs actually incurred when requesting sanctions under Chapter 10.

B. Usual “reasonable and necessary” test does not apply

Sanctions awarded as attorney’s fees fall within the sound discretion of the trial court. *Olibas v. Gomez*, No. 08-06-00010-CV, 2007 WL 2405328, *6 (Tex. App.—El Paso Aug. 23, 2007, pet. denied) (citing *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 778 (Tex. App.—San Antonio 2002, no pet.) (overruling argument that the amount of sanctions was excessive and finding no abuse of discretion because the award was within the range established at trial). Proof of the reasonableness and necessity of attorney’s fees is not required when fees are assessed as sanctions. *Olibas*, 2007 WL 2405328 at *6.

C. Availability of fees as sanction after non-suit

A Rule 162 nonsuit is generally effective when filed, even if the case is on interlocutory appeal at the time. *See Univ. of Texas Medical Branch v. Shultz*, 195 S.W.3d 98, 100-101 (Tex. 2006) (finding that wrongful death plaintiff’s nonsuit during pendency of UTMB’s interlocutory appeal on immunity grounds deprived the

appeals court of jurisdiction where the trial court had not entered any extant judgment).

Rule 162 provides, however, that adverse parties' pending claims for affirmative relief and any pending motions for sanctions, attorney's fees, or other costs are unaffected by a plaintiff's nonsuit. *See* TEX. R. CIV. P. 162.

Notably, although a request for fees "on the merits" must be pending at the time a nonsuit is filed to survive that nonsuit, a request for fees-as-sanctions may be submitted *after* a plaintiff nonsuits a case, provided that the court still has plenary jurisdiction. *See Doolin's Harley-Davidson, Inc. v. Young*, No. 06-05-00101-CV, 2006 WL 27983, *2 (Tex. App.—Texarkana Jan. 6, 2006, no pet.) (mem. op.) (analyzing sanction award in *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996)). In *Doolin's*, the appeals court observed that a trial court's inherent power to impose attorney's fees as sanctions, which does not involve a judgment on the merits of the action, may continue after a nonsuit has been requested. *See id.* at *2-*3. However, the court also held that the trial court is not obligated to consider a sanctions motion filed after a nonsuit has been requested. *See id.* at *3.

VII. ATTORNEY-CLIENT ISSUES

A. Contingent fee contracts

The Texas Supreme Court deemed unconscionable and unenforceable a contingent fee arrangement requiring that, in the event the client chose to terminate the lawyer before the matter concluded, plaintiff would immediately pay the "then present value" of the contingent fee to the lawyer as a termination fee. *See Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 559 (Tex. 2006).

The contingent fee client in *Hoover Slovacek*, a landowner seeking to recover unpaid oil and gas royalties, signed a contingent fee contract with the Hoover Slovacek firm entitling the firm to a 28.66% fee on any recoveries obtained. But after Hoover Slovacek made an allegedly "unauthorized and absurd" settlement demand on one of the defendants and then allegedly failed to prosecute the client's claims while pressuring client to accept the producer's \$6 million settlement offer (which would have

required the client to not only dismiss his claims, but sell substantial property holdings to the producer), the client terminated the Hoover Slovacek firm. The client hired another firm and later settled his claims against the producer for \$900,000.

Hoover Slovacek, alleging that the negotiations for a \$6 million settlement established the "then present value" of Hoover Slovacek's expected 28.66% contingent fee as of the date it was terminated, billed the client \$1.7 million as a termination fee. The client refused to pay. Hoover Slovacek's claim went to a jury, which awarded the firm \$900,000, the same amount that the client had recovered in the underlying suit against the producer.

The supreme court noted that the traditional remedy for a contingent fee attorney's discharge prior to completion of the case (quantum meruit recovery for services to date or enforcement of the contingent fee contract based on the ultimate recovery) is subject to the prohibition against unconscionable fees. *See id.* at 561. Observing that it is a question of law whether a fee contract is contrary to public policy and thus unconscionable at the time of formation, *see id.* at 562, the court identified several reasons why the "present value" termination fee contract was unconscionable, including:

- The "present value" termination fee places an undue burden on the client's ability to change counsel, because the fee is established and immediately payable as of the date that the lawyer is discharged. *See id.* at 562-63.
- The present value termination fee, being due without regard to the outcome of the case, violates the rule that a lawyer is entitled to receive a contingent fee only when and to the extent that a client receives payment. To the extent that a lawyer and client negotiate the allotment of risk in regard to a contingent fee contract, the burden of fair dealing belongs on the lawyer, inasmuch as reasonable clients do not expect that a contingent-fee lawyer will charge a fee equaling or exceeding 100% of the actual recovery. *See id.* at 563. Moreover, the court held that the present value termination fee violates the disciplinary rules by granting the lawyer a property interest in a claim, rather than a fee contingent on the outcome of a case. *See*

id. at 563-64 (citing TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(d)).

- The present value termination fee unfairly shifts risks away from the attorney and to the client. The client bears the risk (inherent in all contingent fee matters) that the lawyer will earn a large percentage of the recovery early on in the case, but if he exercises his right to change counsel, he also bears the risk (inherent in hourly fee matters) that he will owe substantial fees even if he recovers nothing on his claims. *See id.* at 564.

- The present value termination fee creates perverse incentives for the contingent fee lawyer, who would rationally prefer to be discharged and paid immediately once the value of the claim can be established rather than continuing to diligently but efficiently seek the best result possible. *See id.*

- The present value termination fee, as formulated in the *Hoover Slovacek* contract, violates the lawyer's duty to inform a client of the basis or rate of the fee inasmuch as the contract at issue did not explain how the "present value" of the claim would be assessed. *See id.* at 565.

The Supreme Court thus reversed the \$900,000 award as being based on an unconscionable contract, and remanded to the court of appeals for consideration of factual sufficiency issues. *See id.* at 566.

B. Legal malpractice damages

Though recognizing a divergence of opinions on the issue, the Dallas court of appeals held that a client suing a lawyer for professional malpractice may not base the client's damages on the amount of fees the client had paid the lawyer for the mis-handled matter. *See, e.g., Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corp*, 232 S.W.3d 883, 896 (Tex. App.—Dallas 2007, pet. filed).

In *Akin Gump*, the client and its original litigation opponent each won a partial verdict in the original trial, but the original trial court disregarded the partial verdict in favor of the client for failure to obtain necessary findings. As a result, the client lost the verdict in its favor

and was ordered to pay certain fees and costs to its opponent. The client sued its trial counsel, alleging that the failure to request the necessary jury findings constituted legal malpractice. *See id.* at 888. At the malpractice trial, the client sought and the jury awarded the value of the verdict the client should have received in the original trial, as well as the fees that the client had paid the negligent trial counsel to appeal the judgment in the original trial. *See id.* at 889.

The Dallas court reversed. The court observed that, because "even a successful litigant may be forced to defend its judgment when the losing party appeals," the attorney's fees incurred in appealing a judgment are not appropriate malpractice damages, even when the judgment was the result of malpractice. *Id.* at 896. Instead, the Dallas court followed its earlier precedents and held that attorney's fees are never recoverable as damages for malpractice. *See id.* at 896-97 (citing *El Dorado Motors, Inc. v. Koch*, 168 S.W.3d 360, 366 (Tex. App.—Dallas 2005, no pet.) (holding that attorney's fees from prior litigation are recoverable in negligence only when provided for by contract or by agreement between parties); *Newton v. Meade*, 143 S.W.3d 571, 573-75 (Tex. App.—Dallas 2004, no pet.) (client may not recover fees in suit for legal malpractice, as opposed to suit for breach of contract)). The Dallas court noted that the client had not pled and proven a fee forfeiture. *See id.* at 895. (The remedy of fee forfeiture is available in legal malpractice actions where an attorney is found to have breached a fiduciary duty owed to a client. *Bilodeau v. Webb*, 170 S.W.3d 904, 916 (Tex. App.—Corpus Christi 2005, pet. denied). The remedy is exceptional and is limited to cases where there has been a "clear and serious" violation of a fiduciary duty; "it is only in these types of cases [that the] violation of a duty to a client destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation." *Id.* (quoting *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999)).)

The Dallas court observed, however, that "Whether the attorney's fees and expenses incurred in prior litigation with a third party may serve as a measure of damages in a subsequent lawsuit is a subject of wide debate among the intermediate appellate courts of this state." *See id.* at 896. It cited several cases holding that

clients may recover attorney's fees as damages for malpractice, sometimes considered to be an equitable exception to the general rule. *See id.* (citing *Hoover v. Larkin*, 196 S.W.3d 227, 231-32 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Lesikar v. Rappeport*, 33 S.W.3d 282, 306 (Tex. App.—Texarkana 2000, pet. denied) (op. on reh'g) (plaintiff may recover fees as damages where defendant's wrongful conduct forces plaintiff to prosecute or defend litigation in another proceeding); *Standard Fire Ins. Co. v. Stephenson*, 963 S.W.2d 81, 90 (Tex. App.—Beaumont 1997, no pet.) (same); *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838 (Tex. App.—Eastland 1984, no writ) (equitable exception)).

The *Akin Gump* case also addressed an issue of first impression: whether damages in a malpractice suit calculated based on the amount of a but-for award should be reduced by the contingency fee the client would have owed to the negligent counsel had he prevailed. The Dallas court of appeals concluded that negligent counsel is not entitled to a credit for the foregone contingency fee. *See Akin, Gump*, 232 S.W.3d at 898.

The trial counsel in the case argued for reduction of the verdict against it by the ten percent contingency fee the client would have owed the counsel had the client prevailed in the underlying lawsuit. *Id.* at 897. The appeals court noted that some jurisdictions have held that damages should be reduced by the amount of a contingency fee because not to do so violates the basic tort rule that damages are compensatory only and must not put the plaintiff in a better position than it would have been in absent the tort. *See id.* at 897-98. Other jurisdictions have held that damages should not be reduced by the amount of a contingency fee on two grounds. First, the offset credits the negligent attorney with a fee he failed to earn and somewhat rewards his wrongdoing; and second, the deduction fails to fully compensate the plaintiff who has been required to incur new attorney's fees and expenses to recover the judgment it should have won in the trial court. *See id.* at 898. In addition, some other jurisdictions have adopted a middle-road approach, allowing some reduction on a quantum meruit basis. *See id.*

The Dallas court, concluding that the trial counsel could not prevail on a quantum meruit

basis because the jury found it did not render any compensable services to the client in the underlying lawsuit, found that permitting trial counsel a credit for the contingency fee it had failed to earn would reward wrongdoing. *See id.* at 899. On that basis, the court held that an attorney found to have committed malpractice is not entitled to a credit for the contingency fee it would have earned on a but-for judgment. *See id.*

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