

**PROVE AND KEEP YOUR ATTORNEY'S FEES AWARDS:**

**APPRECIATE THE IMPACT OF THE  
TEXAS SUPREME COURT'S 2006-2008 ATTORNEY'S FEES CASES**

University of Texas School of Law  
Page Keeton Civil Litigation Conference  
October 2008

James Holmes  
The Schmidt Firm  
2911 Turtle Creek Blvd., Suite 1400  
Dallas, Texas 75219  
(214) 521-4898  
holmes@schmidtlaw.com

## TABLE OF CONTENTS

I.	Overview of this Paper .....	1
II.	Brief Review of the Law on Recovering Attorney’s Fees .....	1
	A. Contract-Based Attorney’s Fees.....	2
	B. Statutory Contract-Related Attorney’s Fees Under Chapter 38: The Most Often Used Fee-Shifting Statute.....	3
	1. Chapter 38 of the Civil Practice and Remedies Code: The Prerequisite of Recovering Money Damages.....	3
	2. Chapter 38 of the Civil Practice and Remedies Code: The “Presentment” Prerequisite .....	5
	3. Chapter 38 of the Civil Practice and Remedies Code: The “Prevailing Party” Prerequisite .....	7
	C. Rules of Civil Procedure and Attorney’s Fees .....	8
	D. Principles of Equity and Attorney’s Fees.....	9
	E. The Segregation Doctrine and “Inextricably Intertwined” Exception.....	9
	F. Proving the Reasonableness and Necessity of Fees Under the <i>Anderson</i> Factors .....	10
	G. An Upward “Adjustment” to the Lodestar Basis Under the <i>Andersen</i> Factors.....	12
III.	Recent Texas Supreme Court Cases that Impact the Recovery of Attorney’s Fees .....	13
	A. <i>Barker v. Eckman</i> Declines to Impose a “Proportionality Rule” on Fees Awards.....	13
	B. <i>Tony Gullo</i> : A Search for Something New to Say About Segregating Attorney’s Fees.....	20
	C. <i>Varner v. Cardenas</i> Demonstrates that <i>Tony Gullo</i> Does Not Significantly Change the Law on Segregating Attorney’s Fees .....	24
	D. The “Scylla and Charybdis” Scenario that Arises from <i>Brainard v. Trinity Universal Insurance Co.</i> .....	25
	E. <i>Hoover Slovacek LLP v. Walton</i> : Striking a Lawyer-Favoring Withdrawal Provision From a Contingency Fee Contract .....	29
	F. <i>Slack v. Haden</i> : Upholding a Written Fee Agreement as It Is Written, and Justly Allowing an Attorney’s Fees Award Exceeding Actual Damages.....	34

## I. OVERVIEW OF THIS PAPER

In the past two years, the Texas Supreme Court has delivered several important opinions on recovering attorney’s fees in litigation. The most important cases are *Barker v. Eckman* (discussed in subsection III.A below), *Tony Gullo Motor I, L.P. v. Chapa* (discussed in subsection III.B below), *Varner v. Cardenas* (discussed in subsection III.C below), *Brainard v. Trinity Universal Insurance Co.* (discussed in subsection III.D below), *Hoover Slovacsek LLP v. Walton* (discussed in subsection III.E below), and *Sacks v. Haden* (discussed in subsection III.F below). Section III below reviews each case in careful detail. First, though, Section II below briefly reviews the background law on recovering attorney’s fees in order to identify and explain the key legal concepts at play in *Barker*, *Tony Gullo*, *Varner*, *Brainard*, *Walton* and *Sacks*. (Section II also provides a helpful primer on recovering attorney’s fees, although more comprehensive primers exist in hornbooks and practitioners’ outlines, like the *O’Connor’s* series.)

The “good news” for practitioners is that the 2006-2008 cases reaffirm several key principles surrounding attorney’s fees: for instance, *Barker* reiterates that no bright-line rule exists forbidding attorney’s fees from exceeding contract-based damages by a certain degree (that is, a 2-to-1 (fees-to-damages) ratio and a 14-to-1 ratio are not impermissible per se); *Tony Gullo* largely re-embraces the background law on the segregation doctrine and “inextricably intertwined” exception thereto; and *Walton* reaffirms the “Mandell remedies” for attorneys needing to withdraw from contingency fee contracts.

This Paper focuses on some potential “bad news” – that is, case principles making more difficult the recovery of attorney’s fees – so that it can recommend helpful strategies for parties seeking to recover attorney’s fees under the new legal landscape. Focusing on the bad news means suggesting strategies to circumvent the new barriers to recovering attorney’s fees – such as, using the declaratory judgment statute, with its attorney’s fee provision at Section 37.009 of the Civil Practice and Remedies Code, in order to avoid the pitfalls that *Barker* and *Brainard* inject into recovering attorney’s fees under Chapter 38 of the Code.

## II. BRIEF REVIEW OF THE LAW ON RECOVERING ATTORNEY’S FEES

As a general rule, the one party in American litigation does not have the right to recover attorney’s fees from the other party, even when one party prevails or is successful in the litigation and the other party loses the litigation.<sup>3</sup> This background rule can be altered – so that one party recovers fees from the other party – by way of contract,<sup>4</sup> a fee-

---

<sup>3</sup> “For more than a century, Texas law has not allowed recovery of attorney’s fees unless authorized by statute or contract. This rule is so venerable and ubiquitous in American courts it is known as ‘the American Rule.’ Absent a contract or statute, trial courts do not have inherent authority to require a losing party to pay the prevailing party’s fees.” *Tony Gullo Moors v. Chapa*, 212 S.W.3d 299, 310-11 (Tex. 2006).

<sup>4</sup> See *McMann v. McMann*, 942 S.W.2d 94, 96, 98 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1997, no writ) (holding that “the issue before us is whether attorney’s fees should have been awarded pursuant to the parties’ contract, not whether fees should have been awarded pursuant to the statute” and that “[t]he unambiguous agreement mandates recovery of attorney’s fees to the successful party”); *G. Richard Goins*

shifting statute,<sup>5</sup> a rule of civil procedure,<sup>6</sup> or principles of equity.<sup>7</sup> Whether attorney’s fees are available pursuant to contract, statute, procedural rule, or equity is a question of law for the court.<sup>8</sup>

### A. Contract-Based Attorney’s Fees

Private contracts can provide for recovery of attorney’s fees and can establish independent criteria for recovering them – which can differ from the statutory criteria, rules-based criteria, or equity-based criteria discussed below. “Parties are free to adopt a more liberal standard for recovery of attorney’s fees in their contract and the appellate court is bound by their choice.” *Wayne v. A.V.A. Vending, Inc.*, 52 S.W.3d 412, 417 (Tex. App. – Corpus Christi 2001, pet. denied). *See also One Call Sys. v. Houston Lighting & Power*, 936 S.W.2d 673, 676 (Tex. App. – Houston [ 14<sup>th</sup> Dist.] 1996, writ denied) (“[T]he parties were nevertheless free in their contract to adopt a more liberal standard for recovery of attorney’s fees, and we are bound by their choice.”).

Parties, for example, can dispense with the “presentment” requirement, which must be satisfied in order to recover fees under Chapter 38 of the Civil Practice and Remedies Code. *See, e.g., McMann v. McMann*, 942 S.W.2d 94, 96, 98 (Tex. App. –

---

*Constr. Co. v. S.B. McLaughlin Assocs.*, 930 S.W.2d 124, 130 (Tex. App. – Tyler 1996, writ denied) (involving a contract that provided: “any signatory to this contract . . . who is the prevailing party in any legal proceeding brought under or with relation to this contract or transaction shall be additionally entitled to recover court costs and reasonable attorney fees from the non-prevailing party,” and holding as follows: “[P]arties to a contract may provide by agreement that the prevailing party is entitled to recover attorney’s fees. The ‘prevailing party’ is the party who successfully defends against the action on the main issue.” (citation omitted)).

<sup>5</sup> *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 38.001; TEX. BUS. & COM. CODE § 17.50(d).

<sup>6</sup> *See, e.g.*, TEX. R. CIV. P. 215.2(b)(8) (authorizing attorney’s fees as discovery sanctions); *id.* 13 (authorizing attorney’s fees as sanctions for pleadings and filings not made in good faith); *id.* 42(h) & (i) (authorizing attorney’s fees in class actions). *But see In re Moore*, 235 S.W.3d 210, 213 (Tex. 2007) (per curiam) (holding that Texas Rule of Appellate Procedure 43.6 did not authorize a court of appeals’s sanctions order requiring one party to pay the other’s attorney’s fees).

<sup>7</sup> “[S]ome courts have allowed recovery of attorney’s fees as damages based on equitable principles.” *Burnside Air Conditioning & Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 897-98 (Tex. App. – Dallas 2003, no pet.) (citing *Lesikar v. Rappeport*, 33 S.W.3d 282, 306 (Tex. App. – Texarkana 2000, pet. denied); *Baja Energy, Inc. v. Ball*, 669 S.W.2d 836, 838 (Tex. App. – Eastland 1984, no writ)).

<sup>8</sup> *Holland v. Wal-Mart Stores*, 1 S.W.3d 91, 94 (Tex. 1999) (“The availability of attorney’s fees under a particular statute is a question of law for the court.” (citation omitted)); *Cadle Co. v. Ortiz*, 227 S.W.3d 831, 835 (Tex. App. – Corpus Christi 2007, pet. filed) (“[T]he determination of whether attorney’s fees are available in a particular case is a question of law, which we review de novo.” (citation omitted)). The availability of attorney’s fees remains a pure question of law; note, however, that the supreme court recently characterized the segregation doctrine (discussed in subsection III.B below) as a mixed question of law and fact. *See Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006) (“Given all these details, it may often be impossible to state as a matter of law the extent to which certain claims can or cannot be segregated; the issue is more a mixed question of law and fact for the jury.”).

Houston [1<sup>st</sup> Dist.] 1997, no writ) (holding that “the issue before us is whether attorney’s fees should have been awarded *pursuant to the parties’ contract*, not whether fees should have been awarded pursuant to the statute”; that “Section 38.002 [*i.e.*, the presentment requirement] applies only to claimants seeking attorney’s fees ‘under (that) chapter’”; and that “presentment was not required by section 38.002” because “[t]he unambiguous agreement mandates recovery of attorney’s fees to the successful party” (emphasis added)).

Moreover, parties can award fees to the “prevailing” or “successful” party, and – absent direction from the parties’ contract – courts will use definitions developed from attorney’s fees case law in order to ascertain which party is “prevailing” or “successful.” See *G. Richard Goins Constr. Co. v. S.B. McLaughlin Assocs.*, 930 S.W.2d 124, 130 (Tex. App. – Tyler 1996, writ denied) (involving a contract that provided: “any signatory to this contract . . . who is the prevailing party in any legal proceeding brought under or with relation to this contract or transaction shall be additionally entitled to recover court costs and reasonable attorney fees from the non-prevailing party,” and holding as follows: “[P]arties to a contract may provide by agreement that the prevailing party is entitled to recover attorney’s fees. The ‘prevailing party’ is the party who successfully defends against the action on the main issue.” (citation omitted)). Under such case law, “[a] ‘prevailing party’ successfully prosecutes or defends against an action, prevailing on the main issue, even if not to the extent of his or her original contention. Whether a party is a prevailing party is based on success on the merits, not the award or denial of damages. A prevailing party is one who is vindicated by the trial court’s judgment.” *Robbins v. Capozzi*, 100 S.W.3d 18, 27 (Tex. App. – Tyler 2002, no pet.) (citing *City of Amarillo v. Glick*, 991 S.W.2d 14, 17 (Tex. App. – Amarillo 1997, no pet.); *Dear v. City of Irving*, 902 S.W.2d 731, 739 (Tex. App. – Austin 1995, writ denied)).

Defending against attorney’s fees under a contract can consist of (a) prevailing on the merits of the contract dispute (thereby becoming the “prevailing” or “successful” party), see, e.g., *Robbins*, 100 S.W.3d at 27; (b) rescinding the contract, see, e.g., *American Apparel Prods. v. Brabs, Inc.*, 880 S.W.2d 267, 270 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1994, no writ) (“Rescission is an ‘undoing’ of a contract. Its effect is to return the parties to their respective conditions as if no contract had ever existed. Because we have upheld the jury’s finding of rescission, appellant is not entitled to specific performance or attorney fees.” (citations omitted)); or (c) establishing that the party seeking attorney’s fees is in material breach and, thus, cannot enforce the contract’s provisions, see, e.g., *Dobbins v. Redden*, 785 S.W.2d 377, 378 (Tex. 1990) (“It is a well established rule that ‘a party to a contract who is himself in default cannot maintain a suit for its breach.’” (citations omitted)).

## **B. Statutory Contract-Related Attorney’s Fees Under Chapter 38: The Most Often Used Fee-Shifting Statute**

### *1. Chapter 38 of the Civil Practice and Remedies Code: The Prerequisite of Recovering Money Damages*

The Texas fee-shifting statutes seem almost myriad. *O’Connor’s CPRC Plus* contains a helpful summary of most of them. The most important and often-used fee-shifting statute is Section 38.001(8) in Chapter 38 of the Civil Practice and Remedies

Code, which enables the party prevailing on a claim for “an oral or written contract” to recover attorney’s fees.<sup>9</sup> The majority of Texas case law on statutory-based attorney’s fees concerns fee awards under Chapter 38.

Recovering money damages (or something else of value) is a prerequisite to recovering attorney’s fees under Chapter 38.<sup>10</sup> Often, and without analysis, Texas appellate courts will write “[i]f a party prevails on its breach of contract claim *and recovers damages*, it is entitled to attorneys’ fees.” *Apache Corp. v. Dynegy Midstream Services*, 214 S.W.3d 554, 566 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2006, no pet.) (emphasis added; citing *Green Int’l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); TEX. CIV. PRAC. & REM. CODE § 38.001.) But under 38.001, must recovery of money damages truly be a prerequisite to recovery of attorney’s fees?

At least two features in 38.001’s language suggest that recovering damages or something else of value – and not merely prevailing on a contract claim – is necessary in order to recover attorney’s fees. First, 38.001 states “*in addition to* the amount of a valid claim and costs,” thereby suggesting that attorney’s fees are recoverable “in addition to” something – namely, damages or something else valuable, and costs. This “in addition to” language supported at least one appellate court’s decision that damages or something else of value must accompany a fees award under 38.001. *See Rodgers v. RAB Investments, Ltd.*, 816 S.W.2d 543, 551 (Tex. App. – Dallas 1991, no writ) (“As this [Dallas] Court [of Appeals] has stated previously, ‘there must be a recovery of money, *or at least something of value*; otherwise, the attorney’s fee award cannot be described as an ‘addition’ to the claimant’s relief.”) (emphasis added & citation omitted)). In *State Farm Life Insurance Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995), the supreme court began following this appellate decision without analysis.<sup>11</sup> A contract claimant seeking fees under 38.001 who fails to obtain money damages, but who does obtain something else of value, may consider using these decisions for support of a fees award.

Second, 38.001 lists other claims for which fees are recoverable besides “an oral or written contract” – those being “rendered services,” “performed labor,” “furnished material,” “freight or express overcharges,” “lost or damaged freight or express,” “killed or injured stock,” or “a sworn account.” The main thrust of these claims would be

---

<sup>9</sup> *Medical City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 62 (Tex. 2008) (“[Section 38.001(8)] permits an award of attorney’s fees for a suit based on a written or oral contract, and because we conclude that breach of an express warranty is such a claim, the court of appeals erred in reversing [plaintiff’s] attorney’s fees award in connection with its successful claim for breach of an express warranty.”).

<sup>10</sup> “To recover attorney’s fees under § 38.001 [of the Civil Practice and Remedies Code], the party must (1) prevail on a cause of action for which attorney’s fees are recoverable, and (2) recover damages.” *Academy Corp. v. Interior Buildout & Turnkey Constr. Inc.*, 21 S.W.3d 732, 743-44 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2000, no pet.) (citing *Green Int’l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997); *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995)).

<sup>11</sup> The supreme court tends to read into other fee-shifting statutes the prerequisite of recovering money damages, even when other the statutes’ provisions differ from 38.001. *See, e.g., State Farm Life Insurance Co. v. Beaston*, 907 S.W.2d 430, 437 (Tex. 1995) (“Since the fee-shifting provision of Article 21.21 [of the Insurance Code, now repeated] echoes the words of the DTPA and Section 38.001 which provide for awarding attorney’s fees, we hold that a party must satisfy the same two requirements [namely, (1) prevail on a cause of a cause of action for which attorney’s fees are recoverable, and (2) recover damages] to recover attorney’s fees under Article 21.21.”).

recovering money, coupled possibly with injunctive relief. Under a *sui generis*<sup>12</sup> construction of the phrase “an oral or written contract” – that is, reading it as having characteristics similar to the other claims on the list – such a contract claim would primarily concern money damages as well.

At least one published appellate case holds that obtaining “nominal damages” is insufficient to support a fees award under Chapter 38. See *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 256-57 (Tex. App. – Dallas 1990, no writ) (“We reject the claim for nominal damages. Debtors presented neither pleadings nor evidence upon which they might have independently recovered actual damages. Thus, they are not entitled to nominals. We think the attorney’s fee statute, section 38.001, refers to something more than nominal damages when it specifies that attorney’s fees must be in ‘addition’ to the amount of a ‘valid’ claim.”).

2. *Chapter 38 of the Civil Practice and Remedies Code:  
The “Presentment” Prerequisite*

Presenting the underlying claim to the opposing party is another prerequisite to recovering attorney’s fees under Chapter 38.<sup>13</sup> “The purpose of the requirement for presentation of a claim is to allow the person against whom it is asserted an opportunity to pay a claim within 30 days after they have notice of the claim without incurring an obligation for attorney’s fees.” *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). Again, “[p]resentment of a claim under section 38.002 is required to allow the person against whom it is asserted an opportunity to pay it before incurring an obligation for attorney’s fees.” *Panizo v. YMCA of the Greater Houston Area*, 938 S.W.2d 163, 168 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1996, no writ) (citation omitted).

Given the straightforward “purpose” of presentment – to give the defending party an opportunity to pay the contract claim without incurring any attorney’s fees obligation – Texas law allows contract claimants liberally to satisfy the presentment requirement.<sup>14</sup> “No particular form of presentment is required, and it may be written or oral. All that is necessary is that an assertion of a debt or claim and a request for compliance be made to the opposing party, and that the party refuse to pay the claim.” *Panizo*, 938 S.W.2d at 168.

---

<sup>12</sup> “of its own kind or type”

<sup>13</sup> “To recover attorney’s fees under [Chapter 38]:

(1) the claimant must be represented by an attorney;

(2) the claimant *must present the claim* to the opposing party or to a duly authorized agent of the opposing party; and

(3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.”

TEX. CIV. PRAC. & REM. CODE § 38.002 (emphasis added).

<sup>14</sup> Section 38.002 “is to be liberally construed to promote its underlying purposes.” *Panizo*, 938 S.W.2d at 168 (citing TEX. CIV. PRAC. & REM. CODE 38.005).