

# WHAT YOU NEED TO KNOW ABOUT RECOVERY OF ATTORNEY'S FEES UNDER CHAPTER 38

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**C**HAPTER 38 OF THE TEXAS CIVIL PRACTICE and Remedies Code at first blush seems straightforward. It authorizes the recovery of attorney's fees for eight different types of claims—most importantly, claims based on an oral or written contract. But before telling a client that attorney's fees are recoverable on a claim, or advising a client that it risks paying the other side's fees, an attorney should take a closer look at Chapter 38 to make sure his or her intuition and the statute point in the same direction. This article covers the key points any Texas lawyer should know about Chapter 38.

## Section 38.001—Parties and Types of Claims

Section 38.001 provides:

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

- (1) rendered services;
- (2) performed labor;
- (3) furnished material;
- (4) freight or express overcharges;
- (5) lost or damaged freight or express;
- (6) killed or injured stock;
- (7) a sworn account; or
- (8) an oral or written contract.

## Chapter 38 is a One-Way Street

Chapter 38 authorizes a prevailing claimant to recover attorney's fees "in addition to the amount of a valid claim and costs." TEX. CIV. PRAC. & REM. CODE § 38.001(a) and §38.002.<sup>1</sup> Courts have thus concluded that a party who prevails in *defending against* an enumerated claim cannot recover attorney's fees under this chapter. *Barkhausen v. Craycom, Inc.*, 178 S.W.3d 413, 415 n.1 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Moreover, the mere fact a claimant prevails on a cause of action falling under Chapter 38 is insufficient to allow the claimant to recover attorney's fees; the claimant must also recover actual damages before attorney's fees can be awarded. *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). Nominal damages, "traditionally the sum of one dollar or perhaps ten dollars," do not permit the recovery of

attorney's fees. *ITT Commercial Fin. Corp. v. Riehn*, 796 S.W.2d 248, 257 (Tex. App.—Dallas 1990, no writ).

## Chapter 38 Only Applies to Certain Defendants

Lurking in section 38.001 is a trap for unwary litigants. Although a "person" can recover attorney's fees under this section, attorney's fees can only be recovered *from* an "individual" or "corporation." Even though Chapter 38 "shall be liberally construed to promote its underlying purposes," courts have concluded Chapter 38 does not authorize an award of attorney's fees against other types of defendants who do not fall under the statute's express language. For example, a claimant cannot recover attorney's fees from a governmental entity, such as a county, under Chapter 38. *Base-Seal, Inc. v. Jefferson Cnty.*, 901 S.W.2d 783, 787 (Tex. App.—Beaumont 1995, writ denied).

More surprisingly, courts have also held that attorney's fees cannot be recovered from business entities not organized as corporations, such as limited liability partnerships or LLCs. Authority for this proposition stretches back over twenty years to *Ganz v. Lyons Partnership, L.P.*, where a federal judge in the Northern District of Texas held that a limited partnership was not subject to an award of attorney's fees under the statute. 173 F.R.D. 173, 176 (N.D. Tex. 1997). *Ganz* acknowledged cases where limited partnerships had been required to pay attorney's fees, but distinguished those cases as not having reached the question of whether the statutory language permitted such an award. *Id.* at 173-75. Even though *Ganz* could have been a valuable tool for non-corporate entity defendants, no court cited *Ganz* for over ten years. See *Baylor Health Care Sys. v. Nat'l Elevator Indus. Health Benefit Plan*, 3:06-CV-1888-P, 2008 WL 2245834, at \*7 (N.D. Tex. June 2, 2008) (finding Chapter 38 does not authorize recovery of attorney's fees against ERISA plan). And no Texas court of appeals addressed the applicability of Chapter 38 to non-corporate entities until 2014, when the Fourteenth Court of Appeals held in *Fleming & Associates, L.L.P. v. Barton* that Chapter 38 did not apply to a defendant limited liability partnership. 425 S.W.3d 560, 576 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Subsequent decisions from the Texas courts of

appeals have uniformly followed *Fleming* and have expanded its holding to limited liability companies. *8305 Broadway Inc. v. J & J Martindale Ventures, LLC*, 04-16-00447-CV, 2017 WL 2791322, at \*5 (Tex. App.—San Antonio June 28, 2017, no pet. h.); *Varel Int'l Indus., L.P. v. PetroDrillbits Int'l, Inc.*, No. 05-14-01556-CV, 2016 WL 4535779, at \*8 (Tex. App.—Dallas Aug. 30, 2016, pet. denied); *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 214 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *EXCO Operating Co. v. McGee*, No. 12-15-00087-CV, 2016 WL 4379484, at \*2 (Tex. App.—Tyler Aug. 17, 2016, no pet.).<sup>2</sup>

Critics of these decisions have argued there is no reasoned basis for allowing attorney's fee awards against corporations but not against other types of entities. But given the opportunity, neither the Texas Supreme Court nor the Texas Legislature has acted to change this result. The Texas Supreme Court requested full briefing on the merits on this issue in *Fleming & Associates*, but denied the petition for review. No. 14-0435, 2015 Tex. LEXIS 427 (Tex. May 1, 2015). Further, bills were introduced in both of the last two legislative sessions to expand the scope of section 38.001 to include business entities other than corporations, but those bills did not pass. It appears, at least for now, that LLPs, LLCs, and similar entities are safe from an attorney's fee award under Chapter 38.

### Claims Falling Under Chapter 38

Section 38.001(8) is the most-used category of claims under Chapter 38 and applies to a claim for "oral or written contract." TEX. CIV. PRAC. & REM. CODE § 38.001(8). Citing the provision stating that Chapter 38 should be liberally construed, the Texas Supreme Court has permitted recovery of attorney's fees on claims beyond common law breach-of-contract claims. For example, in *1/2 Price Checks Cashed v. United Automobile Insurance Co.*, it was undisputed that a claim between a drawer on a check (the person writing the check) and the payee (named as the recipient of the check) was a contract claim. 344 S.W.3d 378, 384 (Tex. 2011). But the Court also concluded that a claim by a holder (the person who cashed the check, who is not named on the face of the check), which was brought under section 3.414 of Texas's UCC, also sounded in contract and permitted recovery of attorney's fees under Chapter 38. *Id.* at 388, 392. Similarly, claims for breach of express warranty under UCC Article 2 and claims regarding letters of credit authorized by UCC Article 5 can give rise to a recovery of attorney's fees. *See Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 63 (Tex. 2008); *Temple-Eastex Inc. v.*

*Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984).

A claim for breach of a UCC implied warranty falls under Chapter 38 when the damages sought are contractual, but not when tort damages are sought. *See Howard Indus., Inc. v. Crown Cork & Seal Co., LLC*, 403 S.W.3d 347, 352 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see also* TEX. BUS. & COM. CODE § 2.715(b)(2) (authorizing recovery of damages for "injury to person or property proximately resulting from any breach of warranty"). And Texas courts of appeals are divided on whether section 38.001(8) authorizes attorney's fees for a claim of promissory estoppel. *Compare Corpus Christi Day Cruise, LLC v. Christus Spohn Health Sys. Corp.*, 398 S.W.3d 303, 315 (Tex. App.—Corpus Christi 2012, pet. denied) (recoverable), *with Doctors Hosp. 1997, L.P. v. Sambuca Houston, L.P.*, 154 S.W.3d 634, 639 (Tex. App.—Houston [14th Dist.] 2004, pet. abated) (not recoverable).<sup>3</sup>

**The Texas Supreme Court has rejected the argument that fraud based on a breach of contract allows for recovery of attorney's fees.**

Tort claims generally fall outside the ambit of section 38.001(8), but not always. For example, the Dallas Court of Appeals held a conversion claim that is "intrinsically founded on" an issue of contract interpretation permits the recovery of attorney's fees. *R.J. Suarez Enters. Inc. v. PNYX L.P.*, 380 S.W.3d 238, 249 (Tex. App.—Dallas 2012, no pet.). The Fifth Circuit reached the same conclusion for a claim of money had and received that turned on the interpretation of a promissory note. *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 73 (5th Cir. 1987). On the other hand, the Texas Supreme Court has rejected the argument that fraud based on a breach of contract allows for recovery of attorney's fees. *MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 667 (Tex. 2009). Although older authorities indicate a plaintiff can recover attorney's fees for breach of fiduciary duty when those duties arose out of a partnership agreement, a recent decision from the Fourteenth Court of Appeals in Houston rejected this view, relying on intervening Texas Supreme Court decisions. *See, e.g., Rodgers v. RAB Invs., Ltd.*, 816 S.W.2d 543, 550 (Tex. App.—Dallas 1991, no writ); *see also Bruce v. Cauthen*, 515 S.W.3d 495, 516 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

### Section 38.002—Procedural Requirements for Recovery of Attorney's Fees

Once a claimant determines that Chapter 38 applies to a claim, and to a defendant it is suing, the claimant has to satisfy the requirements of section 38.002:

To recover attorney's fees under this chapter:

- (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.

### **Attorney Representation**

The statute requires that a claimant be “represented by an attorney,” but the claimant need not hire outside counsel. For example, courts have held a company can recover fees for the time of its in-house counsel. *Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc.*, 754 S.W.2d 764, 766 (Tex. App.—Houston [1st Dist.] 1988, writ den’d). A law firm can recover fees for the time of one of its own attorneys. *Campbell, Athey & Zukowski v. Thomasson*, 863 F.2d 398, 400 (5th Cir. 1989). And an attorney representing himself or herself *pro se* can recover attorney’s fees for his or her own time. *Beckstrom v. Gilmore*, 886 S.W.2d 845, 847 (Tex. App.—Eastland 1994, writ denied). The question of whether attorney’s fees can be recouped under Chapter 38 when legal services are being provided *pro bono* is unresolved. In *Cruz v. Van Sickle*, 452 S.W.3d 503, 524 (Tex. App.—Dallas 2014, pet. struck), the Dallas Court of Appeals held that a statute allowing a party to recover for attorney’s fees “incurred” did not permit recovery of attorney’s fees when the party was represented *pro bono*. This holding’s application to claims under Chapter 38 is unclear, because Chapter 38 does not reference “incurred” attorney’s fees.

### **Presentment and Tender**

“The purpose of presentment is to allow the opposing party a reasonable opportunity to pay a claim without incurring an obligation for attorney’s fees.” *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006). Chapter 38 does not require a particular form of presentment. Both oral and written presentment are sufficient, but merely filing suit for breach of contract is not. *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.). The statute does not set a deadline for presentment, and courts have reached widely differing conclusions regarding this issue. Some have held presentment must be made 30 days before suit is filed; others have held the deadline to be 30 days before trial or before judgment is entered. See *Healix Infusion Therapy, Inc. v. Helix Health, LLC*, 747 F. Supp. 2d 730, 741 (S.D. Tex. 2010) (collecting cases). To be safe, a claimant should present the claim sooner rather than later.

A tender made in response to presentment must be unconditional, meaning the debtor cannot add conditions to the tender it has no right to impose. *Note Inv. Grp., Inc. v. Assocs. First Capital Corp.*, 476 S.W.3d 463, 487 (Tex. App.—Beaumont 2015, no pet.). For example, a tender by a debtor accompanied by a demand for release by the creditor is a conditional offer. *Crisp Analytical Lab, L.L.C. v. Jakalam Props., Ltd.*, 422 S.W.3d 85, 92 (Tex. App.—Dallas 2014, pet. denied). And to be valid, the tender must be for the full amount requested in the presentment, even if the damages ultimately awarded by the factfinder are less than the amount of the presentment. *Id.*

### **Proving Attorney’s Fees Under Chapter 38**

An entire article could be written on how a party entitled to attorney’s fees can prove them under Texas law. This article is limited to considerations unique to Chapter 38. As noted above, a prevailing claimant may recover “reasonable” attorney’s fees. TEX. CIV. PRAC. & REM. CODE § 38.001. The statute provides a rebuttable presumption that the “usual and customary attorney’s fees for a claim of the type described in Section 38.001 are reasonable.” *Id.* § 38.003. The court may take judicial notice of the usual and customary attorney’s fees, without receiving further evidence, in a case tried before the court and in a jury case where the parties agree to submit the amount of attorney’s fees to the court. *Id.* § 38.004.

### **Waiver of Chapter 38**

Texas follows the American Rule, meaning attorney’s fees are not recoverable unless authorized by statute or contract. *Intercontinental Grp. P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009). But what happens when a party relies on Chapter 38 to recover attorney’s fees regarding a contract that appears to negate the party’s entitlement to attorney’s fees? Chapter 38 does not address whether or how it can be waived. Courts have held that a contract provision that states, as a general matter, that attorney’s fees are not recoverable will not prevent an award of attorney’s fees under Chapter 38. *Herring v. Heron Lakes Estates Owners Ass’n, Inc.*, No. 14-09-00772-CV, 2011 WL 2739517, at \*6 (Tex. App.—Houston [14th Dist.] Jan. 4, 2011, no pet.) (citing *Nat’l Bank v. Sandia Mortg. Corp.*, 872 F.2d 692 (5th Cir. 1989) (applying Texas law)). Rather, the contract must specifically prohibit an award of attorney’s fees under Chapter 38 to amount to an effective waiver. *Id.*

### **Fee Segregation**

Finally, Chapter 38 does not speak to what happens when a plaintiff brings multiple claims, some falling under its provisions and others for which attorney’s fees are not recoverable. As a general rule, a party must segregate its fees

between recoverable and non-recoverable claims. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006). If attorney's fees relate only to a claim for which they cannot be recovered, they must be segregated. *Id.* at 313. But if "discrete legal services advance both a recoverable and unrecoverable claim," the fees need not be segregated. For example, in *Tony Gullo Motors*, the Court commented that "[r]equests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services may be necessary whether a claim is filed alone or with others," and thus might not require segregation. *Id.* at 313. In order to ensure recovery of attorney's fees, however, the safest course is to keep billing records in sufficient enough detail to allow segregation to the extent possible and appropriate.

### Conclusion

Lawyers often add the ubiquitous Chapter 38 claim for attorney's fees at the end of their petition without much thought to the specific requirements and mechanics discussed above. But thought needs to go into this claim at the outset of the litigation to make sure the claimant can recover the fees it is claiming. Transactional attorneys need to understand that they cannot necessarily rely on Chapter 38 to provide for recovery of attorney's fees in the event of a dispute, particularly where the other side is a non-corporate entity such as an LLC or where the attorney's client may be the defendant rather than the claimant. With knowledge of the limitations of Chapter 38, the attorney can include appropriate fee-shifting provisions in the contract itself.

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attorney's fees against a municipal utility district survived rational-basis review, as the Legislature had a legitimate basis in preserving public dollars. *Lake LBJ Mun. Util. Dist. v. Coulson*, 839 S.W.2d 880, 895 (Tex. App.—Austin 1992, no writ). However, a court might not find a rational basis for drawing a distinction between corporations and other business entities.

<sup>3</sup> The Texas Supreme Court has not reached the issue, but it has favorably cited authority allowing recovery of attorney's fees on a promissory estoppel claim. *1/2 Price Checks Cashed*, 344 S.W.3d at 388 (citing *Preload Tech., Inc. v. A.B. & J. Constr. Co.*, 696 F.2d 1080, 1094–95 (5th Cir. 1983)).

<sup>1</sup> Chapter 38 uses the term "claimant," meaning it authorizes recovery of attorney's fees on cross claims, third-party claims, and counterclaims.

<sup>2</sup> One potential ground to attack this line of authority is a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment. The Austin Court of Appeals, addressing a predecessor to section 38.001, held that not allowing the recovery of