

## LITIGATION

By: Brandon K. Bains



Recoverability of attorney's fees can often be the tail that wags the dog in contentious litigation, particularly when a fee claim ends up mirroring - or even eclipsing - the underlying amount sought in the lawsuit to begin with. Thus, in addition to attorney's fees impacting risk analysis for a defendant, it can represent a significant leverage point for a party pursuing recovery. This newsletter will address a recent change in Texas law that has (finally) clarified who can be liable for attorney's fees in a breach of contract case, which is a dominant cause of action in business and construction litigation.

For years, Texas has permitted recovery of attorney's fees in a breach of contract case, and this was codified in Section 38.001 of the Texas Civil Practice and Remedies Code. Generally speaking, this was viewed favorably in the litigation community, as it represented a departure from the "American Rule," which is that parties bear their own costs of litigation. The rub, however, was that in drafting the statute many years ago, the Texas Legislature simply noted that a party could recover its fees against an "individual" or a "corporation." This led to considerable confusion and results that likely did not reflect the Legislature's intent. Indeed, courts began construing the statute narrowly, and as a result, would not allow for recovery of attorney's fees in a suit that was against a limited liability company, partnership, or any other entity that was not strictly a "corporation." As one can imagine, this led to many cases where fees could not be recoverable simply because the defendant was, for instance, an LLC.



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To “Go Green”, our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

*Well done is better than well said.*

- Benjamin Franklin



The Texas Legislature has now remedied this problem. As of September 1, 2021, the statute has been amended to replace “corporation” with “organization.” This definition is then tied to a separate statute in the Business Organizations Code, but the net-net is that it is now a broad term that includes basically any business organization and would swallow up LLC’s, partnerships, joint ventures, etc. Now, really the only type of entity that would still be immune from recovery of attorney’s fees are religious organizations, charitable organizations, and the like.

This is a big deal. We have anecdotally seen instances where the sole reason why certain defendants would create an LLC is to shield themselves from this type of liability in the case of litigation. Now, with attorney’s fees back in play, a defendant in a breach of contract case cannot simply use delay tactics or other strategies to increase attorney’s fees for the other side without risk of footing the bill (which is a common strategy). Certainly, a party will still need to establish that its fees are reasonable in order to recover (unless that is something contracted around by the parties, as is the case with many indemnity agreements), but the proverbial sword of Damocles will now be there as a litigation progresses.



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