Lunch & Learn CLE Webinar:

Taming the Fee Dragon: Attorney's Fees Recovery

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I. INTRODUCTION

"A powerful dragon crying its eyes out under the moon in a deserted valley is a sight and a sound hardly to be imagined."

Lewis, C. S. (1952). *The voyage of the Dawn Treader*.

A party's request to recover attorney's fees in litigation is often an afterthought—cobbled together after the trial has ended with less of the meticulous attention provided to the "main" claims in a case. The original petition or answer containing the basis for attorney's fees recovery was filed long ago, and the party rarely revisits the issue until after the dust of the trial has settled. But as the underlying facts *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019) readily reflect, the potential attorney's fees award may dwarf the underlying damages recovery. *See Rohrmoos*, 578 S.W.3d at 471 ($1.3 million requested award for lease dispute over $250,000 in rent). Yet a fee award that was not proven or preserved at trial is extraordinarily difficult to save on appeal. Conversely, a fee award that was improperly granted—because a party failed to segregate recoverable from unrecoverable fees, failed to offer sufficient proof, or sought fees under a statute that does not authorize them—can present strong appellate issues for the opposing party. Whether a party is entitled to attorney's fees is a question of law, which a court of appeals reviews de novo. *Sunchase IV Homeowners Ass'n v. Atkinson*, 643 S.W.3d 420, 422 (Tex. 2022). But an appellate court reviews the amount of attorney's fees awarded under a legal sufficiency standard. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 490 (Tex. 2019). Granted—success on appeal for an attorney's fees award may only provide the successful appellant with a remand, but a remand on attorney's fees alone may be handy leverage for one side when pushing to settle the case.

This paper surveys various issues arising in Texas attorney's fees recovery—including requirements for proof of fees, statutory authority for fees, segregation, prevailing party status, contingent appellate fees, and emerging context-specific issues, such as how courts are beginning to grapple with AI-assisted legal work.

II. THE BASICS

A. The American Rule in Texas

"In Texas, as in the federal courts, each party generally must pay its own way in attorney's fees." *Rohrmoos,* 578 S.W.3d at 483-84 (citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010)). Texas follows the "American Rule" on attorney's fees, under which litigants are generally responsible for their own attorney's fees and expenses. *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.*, 685 S.W.3d 816, 824 (Tex. 2024); *JCB, Inc. v. Horsburgh & Scott Co.*, 597 S.W.3d 481, 491 (Tex. 2019). The American Rule provides an exception for circumstances where attorney's fees are authorized by statute or contract. *Sealy*, 685 S.W.3d at 824; *see Tucker v. Thomas*, 419 S.W.3d 292, 295 (Tex. 2013). The availability of fees under a particular statute is a question of law for the court. *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, 374 (Tex. App.—Dallas 2020, pet. denied).

In federal court, an attorney's fees award "is governed by the same law that serves as the rule of decision for substantive issues in the case." *Chevron USA, Inc. v. Aker Maritime Inc.*, 689 F.3d 497, 505 (5th Cir. 2012) (citing *Mathis v. Exxon Corp.*, 302 F.3d 448, 461 (5th Cir. 2002)); *Sabre Indus., Inc. v. Module X Sols., L.L.C.*, 845 F. App'x 292, 301 (5th Cir. 2021) (same). "State law controls both the award of and the reasonableness of fees awarded where state law supplies the rule of decision." *DHI Grp., Inc. v. Kent*, No. 21-20274, 2022 WL 3755782, at *3 (5th Cir. Aug. 30, 2022) (quoting *Mathis*, 302 F.3d at 461). Thus, when attorney's fees are sought for state law claims brought in federal court, the applicable state law governs. *See Motis Energy, L.L.C. v. SWN Prod. Co., L.L.C.*, 802 Fed. App'x. 848, 849 (5th Cir. 2020) (citing *Mathis*, 302 F.3d at 461); *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.*, 775 F.3d 242, 248 (5th Cir. 2014).

To recover attorney fees, the party must plead for them, unless fees are mandated by statute. *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015) (generally the "party requesting attorney's fees must affirmatively plead for them to be eligible for a judgment containing a fee award."); *see* Tex. R. Civ. P. 301; *see also Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.); *Swate v. Medina Cmty. Hosp.*, 966 S.W.2d 693, 701 (Tex. App.—San Antonio 1998, pet. denied); *see Rogers v. Bagley*, 623 S.W.3d 343, 357 (Tex. 2021); *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015). The party should identify the specific authority for attorney fees in its pleadings; if it does not, the party is still entitled to fees if it pleads facts that support a claim for them or if the defendant does not object to the failure to identify the authority. *See Whallon v. City of Houston*, 462 S.W.3d 146, 165 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Mitchell v. LaFlamme*, 60 S.W.3d 123, 130 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

The courts of appeals are split on how specific a party's pleading is required to be. Sometimes, a general prayer for attorney's fees may suffice. Several Texas courts have held that when a party pleads facts which, if true, entitle him to the relief sought, he need not specifically plead the applicable statute to recover attorney's fees under it. *MeadWestvaco Corp. v. Way Serv., Ltd.*, No. 09-15-00014-CV, 2016 WL 421303, at *9 (Tex. App.—Beaumont Feb. 4, 2016, no pet.) (mem. op.); *Town Ctr. Mall, L.P. v. Dyer*, No. 02-14-00268-CV, 2015 WL 5770583, at *7 (Tex. App.—Fort Worth Oct. 1, 2015, pet.

denied) (mem. op.); *Whallon*, 462 S.W.3d at 165 (quoting *Gibson,* 440 S.W.3d at 156); *see also Tull v. Tull*, 159 S.W.3d 758, 762 (Tex. App.—Dallas 2005, no pet.). However, courts sometimes require greater specificity in more complex cases. *See Jones v. Uribe*, No. 07-23-00233-CV, 2024 WL 3219184 (Tex. App.—Amarillo June 27, 2024, pet. denied) (holding "a party requesting fees is bound by the statutory provision she pleads" and holding the trial court erred in awarding fees on a plead but incorrect basis); *Compass Bank v. Nacim*, 459 S.W.3d 95, 112-13 (Tex. App.—El Paso 2015, no pet.) (holding a general prayer for fees was insufficient to support a fee award because the prayer had first been included at a time when the plaintiff had not yet pled any facts germane to the contract (and fee provision) that was ultimately at issue, even though the plaintiff later amended his petition to allege facts related to breach of contract).

A potential issue with greater specificity is that some courts have held that "when a party pleads a specific ground of recovery of attorney's fees, the party is limited to that ground and cannot recover attorney's fees on another, unpleaded ground." *Shaw v. Lemon*, 427 S.W.3d 536, 540 (Tex. App. Dallas 2014, pet. denied); *Heritage Gulf Coast Props., Ltd. v. Sandalwood Apts., Inc.*, 416 S.W.3d 642, 660 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Peterson Grp.*, 417 S.W.3d at 61.

A solution is to include both a specific and general request for fees, such as: "The Plaintiffs seek recovery of their reasonable and necessary attorney's fees, costs, and expenses through trial and all appeals under applicable Texas law, including but not limited to Section 38.001 of the Tex. Civ. Prac. & Rem. Code." Trey Cox & Edward Dennis, *Recovery of Attorneys' Fees,* State Bar of Texas: Advanced Civil Trial Course (2014); *see also Daugherty v. Highland Capital Mgmt., L.P.*, No. 05-14-01215-CV, 2016 WL 4446158, at *2 (Tex. App.—Dallas Aug. 22, 2016, no pet.) (mem. op.) (even though defendant had specifically pleaded for fees under Chapter 38, the defendant was entitled to fees under contractual provisions because (1) the plaintiff had fair notice of the contractual provisions since they were quoted in and attached to the provision, and (2) the defendant's pleading sought recovery of fees under "any applicable law").

Even if unpled, a claim for attorney's fees may be tried by consent. *See Hot-Hed, Inc. v. Safehouse Habitats (Scotland), Ltd.*, 333 S.W.3d 719, 733 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Richards v. US Bank Nat'l Ass 'n*, No. 03-13-00590-CV, 2015 WL 657896, at *3 (Tex. App.—Austin Feb. 11, 2015, no pet.) (mem. op.).

As addressed below, many Texas statutes and rules authorize the recovery of attorney's fees. Generally, courts have held that attorney's fees recovery under those statutes is governed by the lodestar method espoused in *Rohrmoos*.

B. Common Statutory Bases

1. Recovery Under Breach of Contract (Chapter 38 of the Texas Civil Practice & Remedies Code)

Texas Civil Practice and Remedies Code Chapter 38 authorizes the recovery of attorney's fees for a breach of contract claim. Chapter 38 provides that "[a] person may recover reasonable attorney's fees from an individual or organization other than a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organization, or a charitable trust, 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(b) (effective September 1, 2021). As noted in Texas Civil Practice and Remedies Code section 38.001(a), the word "organization" has the same meaning as found in Section 1.002, Business Organizations Code, which states:

> "Organization" means a corporation, limited or general partnership, limited liability company, business trust, real estate investment trust, joint venture, joint stock company, cooperative, association, bank, insurance company, credit union, savings and loan association, or other organization, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign.

Tex. Bus. Orgs. Code § 1.002(62).

The current version of the statute (applicable to cases filed on or after September 1, 2021) allows for the recovery of attorney's fees against a wide variety of entities for breach of contract. Under the previous version, Chapter 38 only authorized a person to recover reasonable attorney's fees from an "individual or corporation" in a breach of contract case. Several courts of appeals held that, under its plain language, Chapter 38 authorized an award of fees only against "an individual or corporation," and not against a limited liability partnership or limited liability company. *See First Cash, Ltd. v. JQ-Parkdale, LLC*, 538 S.W.3d 189, 194 (Tex. App.—Corpus Christi 2018, no pet.); *8305 Broadway, Inc. v. J & J Martindale Ventures, LLC*, No. 04-16-00447-CV, 2017 WL 2791322, at *5 (Tex. App.—San Antonio June 28, 2017, no pet.) (mem. op.); *CBIF Ltd. P 'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *25 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.); *Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 211–12 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452–53 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *EXCO Operating Co. v. McGee*, No. 12-15-00087-CV, 2016 WL 4379484, at *2 (Tex. App.—Tyler Aug. 17, 2016, no pet.) (mem. op.); *Fleming & Assocs. L.L.P. v. Barton*, 425 S.W.3d 560, 574–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

- Presentment

Chapter 38 requires a party to present its claim to the opposing party before recovering attorney's fees. Tex. Civ. Prac. & Rem. Code § 38.002(2). "Presentment" has been interpreted to mean "simply a demand or request for payment or performance." *Jetall Cos., Inc. v. Plummer*, No. 01-18-01091-CV, 2020 WL 5900577, at *7 (Tex. App.—Houston [1st Dist.] Oct. 6, 2020, no pet.) (mem. op.); *see also Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). No particular form of presentment is required. *Sandberg v. STMicroelecs., Inc.*, 600 S.W.3d 511, 532–33 (Tex. App.—Dallas 2020, pet. denied). "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 Univ. Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006); *see also Sacks v. Hall*, 481 S.W.3d 238, 250 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

To qualify as a presentment under Chapter 38:

- the plaintiff must assert its claim to the defendant and request compliance, either orally or in writing, *see Panizo v. Young Men's Christian Assoc. of the Greater Hous. Area*, 938 S.W.2d 163, 168 (Tex. App.—Houston [1st Dist.] 1996, no writ);
- the claim asserted must be for money or at least something of value, *Sandberg*, 600 S.W.3d at 532–33; and
- the presentment does not have to refer to a specific amount of damages or name a specific claim or cause of action, *Sunbeam Envt'l. Servs., Inc. v. Tex. Workers' Comp. Ins. Facility*, 71 S.W.3d 846, 851 (Tex. App.—Austin 2002, no pet.).

However, filing a lawsuit by itself is not a proper demand under Chapter 38, nor is an answer to an interrogatory that does not reflect a demand for payment. *Panizo*, 938 S.W.2d at 168; *Helping Hands Home Care, Inc. v. Home Health of Tarrant Cnty., Inc.*, 393 S.W.3d 492, 516 (Tex. App.—Dallas 2013, pet. denied); *Note Inv. Grp., Inc. v. Assocs. First Capital Corp.*, 476 S.W.3d 463, 485 (Tex. App.—Beaumont 2015, no pet.).

"The burden of proof is on the attorney's fees claimant to plead and prove presentment. However, when a claimant avers in his petition that all conditions precedent to recovery have occurred or have been performed, it is required to prove only those conditions precedent that have specifically been denied by the opposing party. *Hynds v. Foster*, No. 01-15-01034-CV, 2017 WL 769909, at *12 (Tex. App.—Houston [1st Dist.] Feb. 28, 2017, no pet.) (mem. op.) (quoting *Shin-Con Dev. Corp. v. I.P. Invs., Ltd.*, 270 S.W.3d 759, 768 (Tex. App.—Dallas 2008, pet. denied); *see also* Tex. R. Civ. P. 54; *Friend v. Friend*, No. 02-15-00166-CV, 2016 WL 7240596, at *6 (Tex. App.—Fort Worth Dec. 15, 2016, no pet.) (mem. op.); *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.); *Knupp v. Miller*, 858 S.W.2d 945, 955 (Tex. App.—Beaumont 1993, writ denied). Any denial must be verified to be effective. *See Nguyen v. Bui*, No. 01-14- 00239-CV, 2015 WL 1825658, at *2 (Tex. App.—Houston [1st Dist.] Apr. 21, 2015, no pet.) (mem. op.) (citing Tex. R. Civ. P. 93(12)); *Goodin v. Jolliff*, 257 S.W.3d 341, 350 (Tex. App.—Fort Worth 2008, no pet.). In the absence of a special exception pointing out the lack of specific pleading of presentment, a pleading is construed liberally in favor of the pleader. *Stevens v. Avent*, No. 07-20-00265-CV, 2022 WL 393576, at *6 (Tex. App.—Amarillo Feb. 9, 2022), reh'g denied, No. 07-20-00265-CV, 2022 WL 878922 (Tex. App.—Amarillo Mar. 15, 2022, no pet.). If the pleading gives "fair notice" that the party is seeking to recover attorney's fees under chapter 38, it is sufficient. *Id.*

A party opposing a fee award may plead excessive demand as an affirmative defense to defeat a claim of presentment. *Triton 88, L.P. v. Star Elec., L.L.C.*, 411 S.W.3d 42, 65 (Tex. App.—Houston [1st Dist.] 2013, no pet.). A demand is not excessive simply because it is greater than that which a jury later determines is actually due. *See id.* Rather, "the dispositive inquiry for determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith." *Nat'l Lloyds Ins. Co. v. Lewis*, No. 09-13-00413-CV, 2015 WL 690807, at *12 (Tex. App.—Beaumont Feb. 19, 2015, pet. denied) (mem. op.) (citation modified).

To be preserved on appeal, presentment must be raised at the trial court. *See* Tex. R. App. P. 33.1(a); *Friend*, 2016 WL 7240596, at *6; *Salem v. Asi*, No. 02-10-00295-CV, 2011 WL 2119640, at *5 n.4 (Tex. App.—Fort Worth May 26, 2011, no pet.) (mem. op.); *Coleman v. Coleman*, No. 01-09-00615-CV, 2010 WL 5187612, at *2 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet.) (mem. op.).

- <u>Usual and customary fees</u>

Chapter 38 also expressly provides that (1) it is presumed that the usual and customary attorney's fees for a claim under the chapter are reasonable and (2) the 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 in a proceeding before the court or a jury case in which the amount of attorney's fees is submitted to the court by agreement. Tex. Civ. Prac. & Rem. Code §§ 38.003, 38.004; *see also Rohrmoos*, 578 S.W.3d at 490 n. 9; *Great Am. Lloyds Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370, 378 (Tex. App.—Dallas 2020, pet. denied). However, this reasonableness presumption can be rebutted. Tex. Civ. Prac. & Rem. Code § 38.003; *Markham v. Citizens Bank, N.A.*, No. 04-22-00246-CV, 2023 WL 5418316, at *4 (Tex. App.—San Antonio Aug. 23, 2023, no pet.)

- <u>*Rohrmoos's* standards on recovery apply under Chapter 38</u>

Several courts of appeals have consistently applied *Rohrmoos's* standards to the recovery of attorney's fees under Chapter 38. *See Accent Builders, Inc. v. Session*, No. 05-23-00675-CV, 2024 WL 3100696, at *2 (Tex. App.—Dallas June 24, 2024, no pet.); *DeBoer v. Attebury Grain, LLC*, 684 S.W.3d 520, 533 (Tex. App.—Eastland 2024, no pet.) *Hall v. Lewis*, 639 S.W.3d 197 (Tex. App.—Houston [1st Dist.] 2021, no pet.); *Great Am. Lloyds. Ins. Co. v. Vines-Herrin Custom Homes, L.L.C.*, 596 S.W.3d 370 (Tex. App.—Dallas 2020, pet. denied); *Vaughan v. Medina*, No. 13-18-00266-CV, 2020 WL 1951441 (Tex. App.—Corpus Christi Apr. 23, 2020, pet. denied) (mem. op.); *Air Jireh Serv. Corp. v. Weaver & Jacobs Constructors, Inc.*, No. 13-15-00180-CV, 2019 WL 3023315 (Tex. App.—Corpus Christi July 11, 2019, no pet.) (mem. op.) (reversing trial court award of attorney's fees for redetermination).

- <u>Mandatory Versus Discretionary Fee Awards</u>

Fee awards under Chapter 38 to a prevailing plaintiff are mandatory in the sense that the trial court has no discretion to deny fees entirely once the statutory elements are satisfied. The amount of the award is within the trial court's discretion, but a zero-fee award where the statute required fees—and the plaintiff properly presented the claim and prevailed—is reversible error.

Additionally, if trial attorney's fees are mandatory under § 38.001, then appellate attorney's fees are also mandatory when proof of reasonable fees is presented. *See Ventling v. Johnson*, 466 S.W.3d 143, 154 (Tex. 2015) (remand on appellate attorney's fees under § 38.001 where there was some evidence to support an award); *DaimlerChrysler Motors Co. v. Manuel*, 362 S.W.3d 160, 198–99 (Tex. App.—Fort Worth 2012, no pet.) (holding that if an award of trial attorney's fees is mandatory under § 38.001, then an award of appellate attorney's fees is likewise mandatory).

2. Declaratory Judgment Actions (Chapter 37)

Under the Texas Uniform Declaratory Judgment Act ("Texas UDJA"), "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. The determination of whether fees are "reasonable and necessary" is a fact question for a jury, but the determination of whether an award is "equitable and just" is a legal question for the trial court. *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W.3d 634, 646 (Tex. 2013); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Therefore, a trial court may decline to award reasonable and necessary attorneys' fees that are supported by sufficient evidence if that court concludes that it is not equitable or just to award such fees. *See Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 161–62 (Tex. 2004); *Kings River Trail Ass 'n Pinehurst Trail Holdings, L.L.C.*, 447 S.W.3d 439, 451–52 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *see also Marion v. Davis*, 106 S.W.3d 860, 868 (Tex. App.—Dallas 2003, 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 upon what is equitable and just, and the trial court's power is discretionary in that respect."). And "[u]nreasonable fees cannot be awarded, even if the court believed them just." *Bocquet*, 972 S.W.2d at 21.

Recently, in *Southwest Sunrise, LLC v. John Gannon, Inc.*, No. 14-25-00237-CV, 2026 WL 1144472 (Tex. App.—Houston [14th Dist.] Apr. 28, 2026), the Fourteenth Court of Appeals reversed and remanded a post-remand attorney's fee award under the Uniform Declaratory Judgment Act, holding that a trial court abuses its discretion by awarding UDJA fees for periods when no declaratory-relief claim was pending. Applying the "equitable and just" standard, the court disallowed recovery of fees for (1) the sixty-day gap between the trial court's grant of Gannon's declaratory relief on December 21, 2021, and Southwest's filing of its own competing declaratory-relief claim on February 21, 2022; and (2) the period following Southwest's nonsuit of all its claims, during which the case proceeded solely on Gannon's breach-of-contract and injunctive-relief claims. Because no declaratory-relief claim was actively being prosecuted or defended during those windows, the court held that awarding fees for those periods was neither equitable nor just—even though Gannon's ancillary claim for declaratory-relief attorney's fees technically remained pending throughout.

There is no prevailing party provision in the Texas UDJA, so a court has the discretion to award fees to either the prevailing or the non-prevailing party. *See Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996). "When an appellate court reverses a declaratory judgment, it may reverse an attorney's fee award, *but it is not required to do so." Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 455 (Tex. 2015) (emphasis added) (citation omitted). Typically, reviewing courts will remand the issue of attorney's fees for reconsideration by the trial court if the underlying declaratory judgment action is reversed. *See Morath v. The Tex. Taxpayer & Student Fairness Coalition*, 490 S.W.3d 826, 885 (Tex. 2016); *Kartsotis v. Bloch*, 503 S.W.3d 506, 520 (Tex. App.—Dallas 2016, pet. denied). While a court *may* award fees to a non-prevailing party under the Texas UDJA, it is rare for a court to do so.

Courts of appeals have discussed and applied *Rohrmoos* to attorney's fees awards under the Texas UDJA. *Schwendeman v. BTSFRL I, LLC*, No. 02-19-00007-CV, 2020 WL 479592 (Tex. App.—Fort Worth Jan. 30, 2020, no pet.) (mem. op.) (applying *Rohrmoos,* court affirmed the attorney-fee award); *Bailey v. Smith*, 581 S.W.3d 374, 397 (Tex. App.—Austin 2019, pet. filed) (citing *Rohrmoos* for the minimum evidence required to support an attorney-fee award and affirming award). The Texas Supreme Court has also discussed and applied *Rohrmoos* to attorney's fees awards under the UDJA. *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 356 (Tex. 2020) (applying *Rohrmoos* to an award of attorney's fees to a party defending against a contingent claim for declaratory judgment).

- <u>Examples where a party cannot obtain attorney's fees.</u>

A party cannot obtain attorney's fees under the Texas UDJA where the declarations sought "merely duplicated issues already before the trial court." *MBM Fin. Corp. v. Woodlands Op. Co., L.P.*, 292 S.W.3d 660, 671 (Tex. 2009). Similarly, the Court has held that "an award of attorney's fees under the DJA is unavailable if the claim for declaratory relief is merely incidental to other claims for relief." *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 301 (Tex. 2011). Some instances where courts have disallowed recovery of fees for duplicative Texas UDJA claims include:

  - **Duplicative of APA Claims.** While the Texas UDJA allows for the recovery of attorney's fees, a claim challenging agency action and rules under the Administrative Procedure Act (APA) does not. "When a statute provides an avenue for attacking an agency order, a declaratory-judgment action will not lie to provide redundant remedies." *Poole v. Karnack Indep. Sch. Dist.*, 344 S.W.3d 440, 445 (Tex. App.—Austin 2011, no pet.) (citations omitted). A claim is redundant under the UDJA when it provides no additional relief to that available under the APA or other statute. *Tex. Dep 't of Transp. v. Tex. Weekly Advocate*, No. 03-09-00159-CV, 2010 WL 323075, at *3 (Tex. App.—Austin Jan. 29, 2010, no pet.) (mem. op.). A court abuses its discretion to award attorney's fees "in connection with a claim for declaratory relief when the statute is relied upon solely as a vehicle to recover attorney's fees." *Poole*, 344 S.W.3d at 445 (citation omitted); *see Strayhorn v. Raytheon E-Sys., Inc.*, 101 S.W.3d 558, 572 (Tex. App.—Austin 2003, pet. denied).
  - **Duplicative of Takings Claims.** In *City of Justin v. Rimrock Enterprises, Inc.*, the Fort Worth Court of Appeals considered whether the trial court erred in granting declaratory relief and awarding attorney's fees under the Texas UDJA when this claim was duplicative of the plaintiff's inverse condemnation claim. 466 S.W.3d 269, 288–89 (Tex. App.—Fort Worth 2015, pet. denied). The court of appeals concluded that the plaintiff's requested

declaratory relief "was merely incidental to—or entirely subsumed by—the two primary issues in this case—whether there was a compensable taking and whether part or all of [the property] had been impliedly dedicated to the public." *Id.* Accordingly, the court of appeals held that the trial court had erred by entering the requested declaration and awarding fees. *Id.*

- **Mirror Image Counterclaims.** "When a party brings a declaratory judgment action by way of a counterclaim or amended petition and the declaratory judgment involves only issues already raised by the original claim, the party is not entitled to an award of attorney's fees." *Save Our Springs All., Inc. v. Lazy Nine Mun. Until. Dist.*, 198 S.W.3d 300, 318 (Tex. App.—Texarkana 2006, pet. denied) (citation omitted); *see also Crews v. Dkasi Corp.*, 469 S.W.3d 194, 204 (Tex. App.—Dallas 2015, pet. denied) (defendants filing counterclaim seeking declaration that plaintiffs were no longer shareholders in shareholder oppression suit was artful restatement of affirmative defense and could not support award of attorney's fees); *CBIF Ltd.*, 2017 WL 1455407, at *13 (a declaration that a covenant not to compete was unenforceable was merely duplicative of the denial of the plaintiff's breach of contract claim). But "[t]he rule, that a mirror-image counterclaim for declaratory relief will not support an award of attorney's fees, only applies when a plaintiff does not request declaratory relief. Once a plaintiff claims relief under the [Texas UDJA], the mirror-image rule does not prohibit the trial court from awarding attorney's fees even if the defendant's counterclaim for declaratory relief only duplicates the claims already raised." *Save Our Springs All.*, 198 S.W.3d at 318 (citation omitted).

- <u>The Texas UDJA and Insurance</u>

Until recently, the question had been settled that attorney's fees were *not* recoverable in connection with a contract claim for underinsured motorist (UIM) benefits under Texas Civil Practice and Remedies Code Section 38.001. The Texas Supreme Court explained in *Brainard* that an insured is required to obtain a legal determination that he is "legally entitled to recover" from an underinsured motorist as a prerequisite to UIM coverage. 216 S.W.3d at 818. But the Court held that attorney's fees are not recoverable for obtaining that legal determination. *Id.* at 818–19. The Court later explained that an insured cannot "seek attorney's fees until, at the earliest, thirty days after the trial court render[s] judgment—assuming that [the insurer] refuse[s] to pay the amount due under the UIM contract." *State Farm Mut. Auto. Ins. Co. v. Norris*, 216 S.W.3d 819, 822–23 (Tex. 2006) (citing *id.).*

Recently, however, insureds have begun framing their claim for underinsured motorist benefits as a declaratory judgment action (rather than a contract action) and have sought attorney's fees under Section 37.009 (rather than Section 38.001).

The Texas Supreme Court addressed these cases in *Allstate Insurance Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021). In a 5 to 4 opinion affirming the judgment of the court of appeals, the Court held that the Texas UDJA could be used for the purpose of determining an insurance carrier's liability for benefits under a UIM policy. The Court reasoned that declaratory relief in this situation is not a disguised breach-of-contract claim or some preliminary phase of such a claim but rather is a remedy unto itself, preventative in nature, that is appropriate under the Texas UDJA, and thus an award of reasonable and necessary attorney's fees as are equitable and just under that act is permitted. *Id.* at 271 (citations modified).

3. Federal Declaratory Judgment Act

Should a party seek a declaratory action in federal court, it would do so under the Federal Declaratory Judgment Act ("Federal DJA") as opposed to the Texas UDJA. Section 2202 of the Federal DJA provides that "further necessary or proper relief based on a declaratory judgment or decree may be granted ... against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. But this section "does not by itself provide statutory authority to award attorney's fees that would not otherwise be available under state law in a diversity action." *Mercantile Nat'l Bank v. Bradford Tr. Co.*, 850 F.2d 215, 218 (5th Cir. 1988).

A party may not rely on the Texas UDJA to authorize attorney's fees in a diversity case because the statute is not substantive law, but a procedural mechanism for resolving substantive "controversies which are already within the jurisdiction of the courts." *Hous. Auth. of City of Harlingen v. Valdez,* 841 S.W.2d 860, 864 (Tex. App.—Corpus Christi 1992, writ denied) (citations omitted). While "a party may recover fees in a federal declaratory judgment action where `controlling substantive law' permits such recovery," the Texas UDJA "is neither substantive nor controlling." *Utica Lloyd's of Tex. v. Mitchell,* 138 F.3d 208, 210 (5th Cir. 1998) (citing *Self—Ins. Inst. of Am., Inc. v. Korioth,* 53 F.3d 694, 697 (5th Cir. 1995)).

4. Texas Citizens Participation Act (Anti-SLAPP Statute)

Chapter 27 of the Texas Civil Practice and Remedies Code, as recently amended, allows a party to file a motion to dismiss if "a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b)[.]" Tex. Civ. Prac. & Rem. Code § 27.003. Except as provided by Section 27.009(c), if a court orders dismissal of a legal action under Chapter 27, it "shall award to the moving party court costs and reasonable attorney's fees incurred in defending against the legal action." *Id.* § 27.009(a)(1). The court may also award sanctions against the moving party to deter that party from bringing similar actions. *Id.* § 27.009(a)(2). Conversely, if a motion to dismiss is "frivolous or solely intended to delay," the court "may award court costs and reasonable attorney's fees to the responding party." *Id.* § 27.009(b). The section further provides that "[i]f the court orders dismissal of a compulsory counterclaim under this chapter, the court may award to the moving party reasonable attorney's fees incurred in defending against the counterclaim if the court finds that the counterclaim is frivolous or solely intended for delay." *Id.* § 27.009(c).

- <u>2019 Amendments to the TCPA</u>

Section 27.009, pertaining to awards of attorney's fees and costs, was amended effective 2019 as part of a larger overhaul of the anti-SLAPP statute. Before September 1, 2019, Section 27.009(a) required the court to award "court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require." In *Sullivan v. Abraham*, the Texas Supreme Court held that this version of the statute required an award of "reasonable attorney's fees" to a successful movant and did not allow the trial court to reduce a fee award based on considerations of "justice and equity." 488 S.W.3d 294, 299 (Tex. 2016). The Court reasoned that the phrase "as justice and equity may require" solely modified "other expenses," but not court costs and attorney's fees. *Id.* at 298–99. As amended, the statute removed the reference to other expenses "incurred in defending against the legal action as justice and equity may require" and solely retains the requirement for an award of "court costs and reasonable attorney's fees" to the successful movant. Tex. Civ. Prac. & Rem. Code § 27.009(a)(1). Additionally, as amended, the statute only allows attorney's fees for dismissal of a compulsory counterclaim *if* the court finds the counterclaim is "frivolous and solely intended for delay." *Id.* § 27.009(c). Finally, sanctions to deter a party from bringing a similar legal action are no longer mandatory. Rather, the trial court "may" award sanctions. *Id.* § 27.009(a)(2). For sanctions against a movant who files a motion to dismiss that is frivolous or intended solely to delay, the court is required to "issue findings regarding whether the legal action was brought to deter or prevent the moving party from exercising constitutional rights and is brought for an improper purpose, including to harass or to cause unnecessary delay or to increase the cost of litigation." *Id.* § 27.007(a).

- <u>Cases Interpreting the Fee Provision in the TCPA</u>

The Texas Supreme Court has not applied the *Rohrmoos* evidentiary standard to an award of fees under the TCPA. Presumably, since the TCPA is a fee-shifting statute, the Court would confirm that a party must prove the reasonableness of attorney's fees under the TCPA using the lodestar method as set forth in *Rohrmoos*.

Courts of appeals have applied *Rohrmoos* to attorney's fees awarded under the TCPA. *See Berry v. Bay, Ltd.*, 643 S.W.3d 424, 432 (Tex. App.—Corpus Christi—Edinburg 2022, no pet.); *Toledo v. KBMT Operating Co., LLC*, 581 S.W.3d 324, 333 (Tex. App.—Beaumont 2019, pet. denied) (reversing an attorney's fee award because the trial court failed to apply the lodestar method properly); *Borderline Mgmt., LLC v. Ruff*, No. 11-19-00152-CV, 2020 WL 1061485, at *9–10 (Tex. App.—Eastland Mar. 5, 2020, pet. denied) (mem. op.); *Lozoya Constr., Inc. v. H & E Equip. Servs., Inc.*, No. 11-19-00287-CV, 2020 WL 1467268, at *10 (Tex. App.—Eastland Mar. 26, 2020, pet. denied) (mem. op.).

The Corpus Christi Court of Appeals concluded that a defendant who successfully obtained dismissal under the TCPA was entitled to have that statute's mandatory attorney's fee award decided by a jury. *Pisharodi v. Columbia Valley Healthcare Sys., L.P.*, 622 S.W.3d 74, 89 (Tex. App.—Corpus Christi 2020, no pet.); *see also Bauta v. Mulvey*, No. 13-20-00388-CV, 2022 WL 1572266, at *7 (Tex. App.—Corpus Christi—Edinburg May 19, 2022, pet. denied). The Court based its decision on the fact that the statute does not dictate the manner of determining the amount of fees, providing only that the award must be "reasonable," and that reasonableness remains a fact issue that a jury, upon proper request, may resolve. *Id.*

5. Rule 91a Motion to Dismiss

Rule 91a, which provides a mechanism to seek the dismissal of baseless causes of action, previously *required* the award of attorney's fees to a prevailing party:

> Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court *must* award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.

Tex. R. Civ. P. 91a.7.

As dictated by the language of the rule, courts of appeals concluded that awarding fees to the prevailing party was mandatory and a trial court's refusal to do so was reversible error. *See Estate of Mathis*, 543 S.W.3d 927, 932–33 (Tex. App.—Eastland 2018, no pet.); *Marshall v. Enter. Bank*, No. 10-16-00379-CV, 2018 WL 4224078, at *5 (Tex. App.— Waco Sept. 5, 2018, pet. denied) (mem. op.); *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 187 (Tex. App.— Houston [14th Dist.] 2015, pet. denied); *Drake v. Chase Bank*, No. 02-13-0040-CV, 2014 WL 6493411, at *2 (Tex. App.— Fort Worth Nov. 20, 2014, no pet.) (mem. op.).

Effective September 1, 2019, the statute authorizing the rule was amended so that the fee award is now in the discretion of the trial court. *See* H.B. 3300, 86th Leg., R.S. (2019) (amending Texas Civil Practice and Remedies Code, Section 30.021). The bill analysis for H.B. 3300 explains that the mandatory award of costs and fees to the prevailing party discouraged potential motions to dismiss because parties were reluctant to expose themselves to costs and fees. Bill Analysis for H.B. 3300, 86th Leg., R.S. (2019). "H.B. 3300 seeks to encourage the dismissal of baseless causes of action and reduce court backlog by making the award of costs and fees discretionary." *Id*. Rule 91a.7 now provides:

> Except in an action by or against a governmental entity or a public official acting in his or her official capacity or under color of law, the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. Any award of costs or fees must be based on evidence.

Tex. R. Civ. P. 91a.7 (effective September 1, 2019); *see* Final Approval of Amendments to Texas Rule of Civil Procedure 91a.7, Nov. 12, 2019 (Tex. Misc. Docket No. 19-9108).

Several appellate courts have applied the *Rohrmoos* standard to an award of attorney's fees under the amended rule. *See Reeder v. Everything Blockchain Inc.*, No. 03-23-00122-CV, 2024 WL 3731637, at *1 (Tex. App.—Austin Aug. 9, 2024, no pet.); *Hilderbran v. Tex. Sw. Council, Inc., Boy Scouts of Am.*, No. 04-22-00736-CV, 2024 WL 3167376, at *10 (Tex. App.—San Antonio June 26, 2024, no pet.).

6. Prompt Payment of Claims Act (Chapter 542A of the Texas Insurance Code)

In the homeowner's insurance context, the Fifth Circuit certified a question to the Texas Supreme Court concerning the Prompt Payment of Claims Act and attorney's fees:

> In an action under Chapter 542A of the Texas Prompt Payment of Claims Act, does an insurer's payment of the full appraisal award plus any possible statutory interest preclude recovery of attorney's fees?

An insured sought additional money after accepting a payment from his insurer, claiming breach of contract and statutory claims under the Insurance Code. *Rodriguez v. Safeco Ins. Co. of Indiana*, 684 S.W.3d 789, 790 (Tex. 2024). The parties agreed that Chapter 542A would govern an attorney's fees award for any of the insured's claims. *Id*. at 791. After removing the case to federal court, the insurers invoked the policy's appraisal provision and paid the damages amount specified by the appraisal panel plus interest to the insured. *Id*. The parties disagreed as to whether the insurer's payment of the appraisal award foreclosed an award of attorney's fees under Chapter 542A.

The Supreme Court concluded section 542A.007 of the Insurance Code prohibited "an award of attorney's fees when an insurer has fully discharged its obligations under the policy by voluntarily paying the appraised amount, plus any statutory interest, in compliance with the policy's appraisal provisions. *Id*. at 792. Under Chapter 542A, attorney's fees are limited to reasonable fees multiplied by "the amount to be awarded in the judgment to the claimant for the claimant's claim under the insurance policy" divided by the amount claimed in the required statutory notice. Based on the plain language of the statute, the Court maintained that the numerator of the ratio is zero, and thus no amount could be awarded in a judgment under the policy because the insurers had complied with its contractual obligation when it timely paid the full amount owed under the policy's appraisal provision. *Id*. at 793.

As the courts of appeals apply R*odriguez v. Safeco*, more issues may arise in the future. *Homeowners of Am. Ins. Co. v. Menchaca*, No. 01-23-00633-CV, 2025 WL 2165187, at *8 (Tex. App.—Houston [1st Dist.] July 31, 2025, pet. denied) (because insurers paid full appraisal award and any possible statutory interest, claimant could not recover attorney's fees and trial court erred in awarding fees); *Knopp v. State Farm Lloyds*, No. 05-22-00749-CV, 2024 WL 3579432, at *7 (Tex. App.—Dallas July 30, 2024, pet. denied) (trial court did not err in failing to award fees where *Rodriguez* barred recovery of attorney's fees because insurers paid full appraisal award plus any possible interest).

7. Texas Property Code

The Texas Property Code has several provisions that provide a party with an opportunity to recover attorney's fees, including:

- **Section 24.006** (Forceable Entry and Detainer). *See Sloane v. Goldberg B'Nai B 'Rith Towers*, 577 S.W.3d 608 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (applying *Rohrmoos* to an attorney's fee award under Property Code section 24.006, applying to forcible entry and detainer). This statute also awards the prevailing party all court costs. Tex. Propt. Code § 24.006(d).

- **Section 82.161(b)** (permits recovery of fees in a suit to enforce a condominium association's declarations or bylaws). *See Sunchase IV Homeowners Ass 'n, Inc. v. Atkinson*, 643 S.W.3d 420, 424 (Tex. 2022) (per curiam) (applying *Rohrmoos*: "[c]onsistent with *Rohrmoos,* Sunchase is a prevailing party because it obtained a take-nothing judgment on the main issue of the litigation.").

- **Section 5.006(a)** (Attorney's Fees in a Breach of Restrictive Covenant Action). *See Walker v. Wolfe Airpark Civic Club, Inc.*, No. 14-23-00748-CV, 2025 WL 1037265, at *4 (Tex. App.—Houston [14th Dist.] Apr. 8, 2025, pet. denied); *Haas v. Ashford Hollow Cmty. Improvement Ass'n, Inc.*, 209 S.W.3d 875, 884 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Jim Rutherford Inv., Inc. v. Terramar Beach Cmty.*, 25 S.W.3d 845, 853 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The statute also contains a prevailing party requirement.

8. *Texas Uniform Trade Secrets Act*

The Texas Uniform Trade Secrets Act (TUTSA), Texas Civil Practice and Remedies Code §§ 134A.001–134A.008, provides a statutory framework for civil misappropriation claims, displacing prior common law theories and serving as the exclusive remedy for trade secret misappropriation. TUTSA protects information deriving independent economic value from secrecy—including formulas, methods, processes, and customer lists—so long as the owner takes reasonable measures to maintain that secrecy. Remedies include injunctive relief, actual damages, unjust enrichment, reasonable royalties, and exemplary damages (up to twice actual damages for willful and malicious misappropriation). Attorney's fees are available to a prevailing party where the claim or defense was brought in bad faith. TUTSA coexists with the federal Defend Trade Secrets Act, which adds a federal forum and the unique remedy of ex parte seizure, making dual pleading a common strategy.

While the Texas Supreme Court has not applied *Rohrmoos* to fee recovery under TUFTA, the Fourteenth Court of Appeals has. *See McCoy v. Van Sickle*, No. 14-24-00501-CV, 2026 WL 1004268 (Tex. App.—Houston [14th Dist.] Apr. 14, 2026, no pet. h.) (mem. op.).

9. *Other statutory bases*

Courts have applied *Rohrmoos* and the lodestar method for the recovery of attorney's fees to multiple Texas statutes, including:

- *Welch v. Christus Good Shepherd Med. Ctr.-Marshall*, No. 06-19-00089-CV, 2020 WL 1696086 (Tex. App.—Texarkana Apr. 8, 2020, no pet.) (mem. op.) (applying *Rohrmoos* to attorney's fees awarded following dismissal of healthcare liability claims);

- *KBIDC Invs., LLC v. Zuru Toys Inc.*, No. 05-19-00159-CV, 2020 WL 5988014 (Tex. App.—Dallas Oct. 9, 2020, pet. filed) (mem. op.) (applying *Rohrmoos* when addressing an attorney-fee award under Chapter 134 of the Texas Civil Practice and Remedies Code, the Theft Liability Act);

- *In re S.G.*, No. 08-19-00008-CV, 2020 WL 103971 (Tex. App.—El Paso Jan. 9, 2020, no pet.) (mem. op.) (applying *Rohrmoos* to attorney's fees in a family law context);

- *Jardon v. Pfister*, 593 S.W.3d 810 (Tex. App.—El Paso 2019, no pet.) (same); *In re K.A.M.S.*, 583 S.W.3d 335 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (same).

C. Contract-Based Fee-Shifting

Contractual fee-shifting provisions are generally enforced as written, though courts will scrutinize them for ambiguity and scope. "Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's." *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653 (Tex. 2009); *Rohrmoos*, 578 S.W.3d at 484 (same); *see also Peterson Grp., Inc. v. PLTQ Lotus Grp., L.P.*, 417 S.W.3d 46, 60 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Accordingly, courts will enforce the award of attorney's fees in accordance with the specific requirements set forth in the contract. *Peterson*, 417 S.W.3d at 60.

In *Rohrmoos,* the Texas Supreme Court again confirmed that parties to a contract can agree to a recovery standard different from that under Chapter 38. 578 S.W.3d at 484–85. To recover under Chapter 38, a party must both (1) prevail on a cause of action for which attorney's fees are recoverable, and (2) recover damages. *Id*. at 484. The parties' lease agreement provided that the "prevailing party" shall be entitled to a recovery of attorney's fees, without defining the term, mentioning an award of damages, or limiting attorney's fees to a prevailing plaintiff. *Id*. In determining the parties' competing claims against each other, the jury found that both the tenant and landlord failed to comply with the lease, but that the landlord (Rohrmoos) failed to comply first. Though the tenant did not seek damages, the landlord did, and the tenant successfully defended against them. The trial court awarded the tenant its attorney's fees under the "prevailing party" provision of the lease. The Supreme Court disagreed with Rohrmoos's contention that the tenant was not a "prevailing party" under the lease. The Court explained: "A defendant can obtain actual and meaningful relief, materially altering the parties' legal relationship, by successfully defending against a claim and securing a take-nothing judgment on the main issue or issues in the case." *Id*. at 486.

III. Prevailing Party Requirement

Many statutes permit the award of fees only to a "prevailing party." For instance, Texas Civil Practice and Remedies Code Chapter 38—addressed further below—imposes a prevailing-party requirement to recover fees in breach of contract claims. "To recover attorney's fees under section 38.001, a party must (1) prevail on a cause of action for which attorney's fees are recoverable, and

(2) recover damages." *Rohrmoos*, 578 S.W.3d at 484 (quoting *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex. 1997)).

Often, contractual fee provisions will also specify that only a "prevailing party" can recover attorney's fees under the provisions of the contract that allow for attorney's fees recovery as an agreed exception to the American Rule. Specifically, addressing a "prevailing party" lease provision, the *Rohrmoos* Court provided guidance on ascertaining whether a litigant is a "prevailing party" when the term is undefined in the governing statute or contract. In its real estate dispute, the landlord and tenant had competing claims. Though the tenant did not seek damages by trial, the landlord did. The jury awarded a take-nothing judgment, and the trial court awarded the tenant attorney's fees under the lease's prevailing-party provision. At the Supreme Court, the landlord claimed the tenant was not a "prevailing party" under the lease. The Supreme Court disagreed: "A defendant can obtain actual and meaningful relief, materially altering the parties' legal relationship, by successfully defending against a claim and securing a take-nothing judgment on the main issue or issues in the case." *Id*. at 486. Thus, if a person is vindicated by a judgment that alters the legal relationship between the parties, the person can be considered a prevailing party unless the term is defined otherwise. *See, e.g., Sunchase IV Homeowners Ass'n*, 643 S.W.3d at 422–24; *Bigbee v. Samadian Family Ltd. P 'ship*, No. 05-20-00656-CV, 2022 WL 4298725, at *3 (Tex. App.—Dallas Sept. 19, 2022, pet. denied).

The Texas Supreme Court has issued other recent opinions concerning "prevailing party" requirements. In *JCB, Inc. v. Horsburgh & Scott Co.*, on a certified question from the Fifth Circuit, the Texas Supreme Court evaluated whether the Texas Sales Representative Act imposed a "prevailing party" requirement on a plaintiff's award of attorney's fees. 597 S.W.3d 481 (Tex. 2019). The statute provides that "[a] principal who fails to comply with a provision of a contract ... related to payment of a commission ... is liable to the sales representative ... for ... reasonable attorney's fees and costs." *Id*. at 491 (quoting Tex. Bus. & Com. Code § 54.004(2)). The plaintiff had proven that the defendant failed to comply with the contract but had not recovered the treble damages authorized by the statute. The defendant argued that because the plaintiff did not recover treble damages, the plaintiff was not a "prevailing party" entitled to recover fees. But because the statute at issue did not impose a "prevailing party" requirement, the Supreme Court disagreed. *Id*. ("In this case, ... the statute contains no prevailing-party requirement, and we decline to imply one."). The statute required a principal who, like the defendant, "failed to comply" with a commission contract to pay fees. *Id*. Therefore, the plaintiff was entitled to fees.

In 2018, the Texas Supreme Court considered who the "prevailing party" is under Rule 91a when a defendant loses on its Rule 91a motion to dismiss but later prevails on a summary judgment motion. *See ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 879–80 (Tex. 2018). In the final judgment, the trial court awarded fees under Rule 91a to the plaintiff, despite the defendant prevailing on summary judgment. The court of appeals and the Supreme Court both affirmed. The Court reasoned that Rule 91a allows the award of attorney's fees when a party prevails "on the motion"—not a later summary judgment. *Id*. at 880. Further, the Court noted that the defendant could have challenged the denial of its motion to dismiss by mandamus. *Id*. "We reject Burlington's argument that it is entitled to recover attorney's fees as the prevailing party on the motion under Rule 91a when Burlington received an adverse ruling on that motion, did not challenge the ruling at that time, and later prevailed on its motion for summary judgment, which became final when it was not appealed to this Court." *Id*.

A defendant can be a prevailing party under a contractual fee provision when the plaintiff nonsuits his case *with or without* prejudice. *Epps v. Fowler*, 351 S.W.3d 862, 868–69 (Tex. 2011). The Texas Supreme Court considered whether a defendant is a prevailing party entitled to attorney's fees when a plaintiff nonsuits a claim *without* prejudice. *Id*. at 864. First, the Court had no doubt that a defendant is a prevailing party when a plaintiff nonsuits *with* prejudice "because a nonsuit *with* prejudice immediately alters the legal relationship between the parties by its res judicata effect" to the "defendant's benefit" because it "can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter." *Id*. at 864, 868-69 (emphasis added). The Court also noted that a plaintiff's notice of nonsuit does not affect an opponent's pending claims for affirmative relief, including a claim for attorney's fees. *Id*. at 868.

Second, the Court held that "a defendant may be a prevailing party when a plaintiff nonsuits *without* prejudice if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits." *Id*. at 870 (emphasis added); *see also N. Star Water Logic*, *LLC v. Ecolotron, Inc.,* 486 S.W.3d 102, 108 (Tex. App.—Houston [14th Dist.] 2016, no pet.). But awarding attorney's fees on any nonsuit regardless of reason or effect would penalize plaintiffs for dropping unwarranted claims and "actually encourage plaintiffs to pursue claims that should be abandoned." *Epps*, 351 S.W.3d at 869.

When reviewing a trial court's decision to grant or deny attorney's fees under a "prevailing party" clause in a contract when the plaintiff has nonsuited its claims, Texas courts of appeals have held that a mixed standard of review applies: factual questions, such as whether a party nonsuited to avoid an unfavorable ruling, will be reviewed for an abuse of discretion; and legal determinations, such as whether the suit had an arguable basis in law, will be reviewed de novo. *See Hoheisel v. Boyd*, No. 02-19-00142-CV, 2020 WL 370570, at *7 (Tex. App.—Fort Worth Jan. 23, 2020, no pet.) (mem. op.); *N. Star Water Logic*, 486 S.W.3d at 105; *Referente v. City View Courtyard, L.P.*, 477 S.W.3d 882, 885–86 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

Additionally, a party can be a "prevailing party" if it resolves through settlement and agreed judgment what it was seeking to achieve through trial. *See Zuehl Land Dev., LLC v. Zuehl Airport Flying Cmty. Owners Ass 'n, Inc.*, 510 S.W.3d 41, 47–48 (Tex. App.—Houston [1st Dist.] 2015, no pet.). In *Zuehl*, the court of appeals stated that "the trial court's order contains declarations that are directly relevant to the denied claims, beneficial to the [plaintiffs'] litigation position, and binding on the [defendant]." *Id*. at 49.

As confirmed in a recent Supreme Court of Texas holding, "a summary judgment against a party's claim necessarily dooms its request for a prevailing-party fee remedy on that claim." *Sealy Emergency Room, L.L.C. v. Free Standing Emergency Room Managers of Am., L.L.C.*, 685 S.W.3d 816, 825 (Tex. 2024). In *Sealy,* the Supreme Court held that once the trial court rendered summary judgment against a claim, it was not required to expressly deny a fee remedy, available only under a prevailing-party standard, for the judgment to be final. *Id*. (citing *Bertucci v. Watkins*, No. 03-20-00058-CV, 2022 WL 3328986, at *5 (Tex. App.—Austin Aug. 12, 2022, no pet.) (en banc)). When a party has proven that an award of attorney's fees is mandatory or requests a discretionary award of attorney's fees under a statute or contract that does not require it to prevail, the rule is different. *Id*. There, the trial court must expressly dispose of the fee request to render a final judgment. *Id*. (citing examples where a statute provides that a party "may recover," "shall be awarded," or "is entitled to" fees) (internal citations omitted).

The Supreme Court has requested briefing on the merits for a case concerning an award of attorney's fees and whether a party was considered the "prevailing party" under a fee-shifting provision in a homeowners' association's covenants, conditions, and restrictions. *See Gonzalez v. Zubarik*, No. 05-23-00190-CV, 2024 WL 3886434 (Tex. App.—Dallas Aug. 21, 2024, pet. filed); *see also* Case No. 24-0824, *Zubarik v. Gonzalez, et al.*, pending at the Supreme Court of Texas. (As of this writing, the Court has received full briefing, but the petition has not been granted.)

The case arose from a dispute between Zubarik (a member of a homeowners' association) and five other members of the association. Zubarik sued the other members for a declaratory judgment that their privacy fences violated the covenants, conditions, and restrictions; the other members filed a counterclaim against Zubarik and a third-party claim against the association, and the association filed a crossclaim against Zubarik. Zubarik sought summary judgment on its declaration and an injunction requiring the privacy fences to be removed. Later, however, the trial court vacated its injunction. After a jury trial, the jury awarded Zubarik his attorney's fees, and the trial court signed a final judgment awarding Zubarik $260,620 in attorney's fees. At issue is whether, under the fee-shifting provision, Zubarik was entitled to attorney's fees as a prevailing party despite the fact that the trial court vacated his summary judgment win.

While the Court has not granted the petition in *Zubarik*, it has recently addressed who is a prevailing party in *Webb Consol. Indep. Sch. Dist. v. Marshall*, No. 24-0339, 2026 WL 1108676, (Tex. Apr. 24, 2026), in the context of a temporary injunction. Two school-board members, the Marshalls, sued their district under Texas Education Code § 11.1512 after it failed to produce certain requested documents and information. The statute grants board members an "inherent right of access" to district records and authorizes injunctive relief plus attorney's fees for members who "prevail[]" in such suits. Tex. Educ. Code § 11.1512. The trial court issued a temporary injunction, ordering the district to produce the requested materials, and the district complied. The district did not appeal. Later, the Marshalls' terms expired, mooting their remaining claims before trial. Thus, the question was whether obtaining the temporary injunction—followed by the district's compliance—constituted "prevailing" under the statute.

The Court recognized that a party does not "prevail" for fee purposes by obtaining a temporary injunction, *Webb*, 2026 WL 1108676, at *4 (citing *Lackey v. Stinnie*, 604 U.S. 192 (2025)), as such orders preserve the status quo rather than adjudicate the merits. But here, the statutory scheme provides no available remedy beyond injunctive relief. The Court maintained that once the district disclosed the information and the members acquired knowledge of it, the litigation was effectively over on the merits—not mooted by subsequent events. The Court held the Marshalls prevailed as to the four categories of documents covered by the injunction order. But the Marshalls may recover only the fees attributable to the claims resolved by the September 2020 temporary injunction, not the fees incurred over the additional years of litigation involving separate document requests (later mooted). Thus, segregation principles apply.

Additionally, the Court separately held that § 11.1512 creates a statutory exception to the general administrative-exhaustion requirement, reasoning that the Legislature's use of the word "suit" (rather than "appeal"), and its authorization of injunctive relief that the Commissioner of Education cannot provide, demonstrate an intent to permit board members to proceed directly to court. The case was remanded for a determination of segregated, recoverable fees.

In his concurrence, Justice Hawkins joined the majority opinion but wrote separately to address what he viewed as the precise analytical basis for the result: the Marshalls prevailed not because a temporary injunction can ever confer prevailing-party status in the ordinary sense, but because the order issued in this case was not a true temporary injunction. *Webb*, 2026 WL 1108676, at *8 (Hawkins, J., concurring) The order's label does not determine its legal character. He cautioned against treating the majority's holding as softening the general rule that temporary injunctions do not create prevailing parties.

IV. THE MATH: EVIDENCE AND CALCULATIONS

While the statutes and rules governing recovery may differ as to what is required to recover attorney's fees, the calculation of those attorney's fees is the same based on the *Rohrmoos* decision. This calculation, and the evidence that the court required to

A. The *Rohrmoos* Framework

For decades, Texas courts evaluated attorney's fees under the multi-factor *Arthur Andersen* framework, which directed consideration of factors such as the time and labor required, the novelty and difficulty of the questions involved, the skill necessary to perform the service, and the results obtained. *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). While those factors remain relevant, the Texas Supreme Court in *Rohrmoos* substantially clarified the evidentiary requirements by aligning Texas practice with the federal lodestar methodology.

Rohrmoos involved a commercial lease between landlord Rohrmoos Ventures and tenant UT Southwestern DVA Healthcare, LLP (UTSW), which was using the building as a dialysis clinic. 578 S.W.3d at 475. Water penetrated the building's foundation and floor, causing severe disagreements between the landlord and tenant. *Id*. UTSW viewed the building as unsuitable for its commercial purpose, so it terminated the lease early and sued Rohrmoos. *Id*. The lease agreement contained a fee-shifting arrangement: "the prevailing party shall be entitled to an award for its reasonable attorney's fees' from the non-prevailing party in any action to enforce the terms of the Lease." *Id*. at 476 (citation modified).

UTSW's trial evidence that the fees were "reasonable and necessary" included testimony from UTSW's attorney, such as:

- he had 20 years of litigation experience;
- the standard rate he charged was $430 per hour;
- he previously handled cases similar in nature;
- a reasonable and necessary number of hours for this case would be around 750-1,000; and
- multiplied by his hourly rate, the amount would range from $322,500 to $400,000, so a fee between $300,000 and $400,000 would be reasonable and necessary.

Id. But he also testified that:

- the case had "not been worked up in a reasonable fashion;"
- his fees were "much closer to...over $800,000;"
- there was a need to search "millions" of emails, review "hundreds of thousands of documents," addressing forty depositions and a forty-page summary judgment; and
- the *Arthur Andersen* factors (amount in controversy, complexity of the case, knowledge and experience) supported the $800,000 amount.

Id. The jury determined $800,000 in attorneys' fees for representation in the trial court, $150,000 for the court of appeals, and $75,000 for the Texas Supreme Court, and the trial court awarded the amount determined by the jury. *Id*. at 476–77. The court of appeals affirmed the judgment, asserting that the "lodestar method" discussed in *El Apple I, Ltd. v. Olivas* did not apply. *Id*. at 478 (citing *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012)).

The Texas Supreme Court reversed, discussing at length the prior development of the lodestar analysis and concluding the analysis applied to "any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed." *Id*. at 497–98. The Court also noted that the lodestar method was a "short-hand version" of the *Arthur Andersen* factors, and not a separate test or method. *Id*. at 496. And the Court reaffirmed that:

> The fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such

> services. This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process.

Id. at 498 (citations omitted).

Citing the U.S. Supreme Court, the Court recognized that the lodestar method produces an approximate base amount, but "other considerations may justify an enhancement or reduction to the base lodestar." *Id*. at 501 (citing *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558–59 (2010)).

While the Court acknowledged UTSW's attorney's explanation that the base lodestar amount should be enhanced to $800,000 due to opposing counsel driving up the cost of litigation, the Court concluded the testimony was too general and, thus, legally insufficient to support the enhanced attorney's fees award. *Id*. at 505. The Court remanded the case to the trial court for a redetermination of fees.

B. Recovering Attorney's Fees Using Redacted Invoices

The Court in *Rohrmoos* held that contemporaneous billing records are "not required to prove that the requested fees are reasonable and necessary," but are nevertheless "*strongly* encouraged to prove the reasonableness and necessity of requested fees." 578 S.W.3d at 502 (emphasis in original). Texas courts of appeals recognize that attorney billing records may be redacted in appropriate circumstances, but only to the extent that the redactions do not prevent the factfinder from evaluating the reasonableness and necessity of the fees sought. Fee evidence cannot be so obscured that it becomes "impossible for a finder of fact to determine whether the work done was reasonable and necessary." *Person v. MC-Simpsonville, SC-1-UT, LLC*, 2021 WL 3816332, at *5 (Tex. App.—Austin Aug. 27, 2021, no pet.); *see also McGibney v. Rauhauser*, 549 S.W.3d 816, 821 (Tex. App.—Fort Worth 2018, pet. denied). Consistent with this principle, a factfinder must be able to discern, with the requisite specificity, what tasks were performed and how those tasks relate to the claims at issue. *See Westheimer v. Ziemer*, 702 S.W.3d 621, 632–33 (Tex. App.—Houston [1st Dist.] 2024, no pet.).

At the same time, courts have rejected a rigid requirement that invoices be entirely unredacted. Partial redactions—such as those protecting attorney-client privilege, work product, or litigation strategy—do not automatically render invoices insufficient, so long as the remaining descriptions allow the trier of fact to assess the nature of the work performed. *See Calleja-Ahedo v. Compass Bank*, 2020 WL 3820420, at *12 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.). Even heavily or extensively redacted invoices may support a fee award when coupled with attorney testimony explaining the services rendered, the time expended, and the relationship of that work to the claims pursued. *Tite Water Energy v. Wild Willy's Welding*, No. 01-22-00158-CV, 2023 WL 5615816, at *11–12 (Tex. App.—Houston [1st Dist.] Aug. 31, 2023, pet. denied) (mem. op.); *Starry Skies Ranch, L.P. v. Chappell Hill Constr., Co.*, No. 01-22-00760-CV, 2024 WL 4628408, at *25 (Tex. App.—Houston [1st Dist.] Oct. 31, 2024, pet. denied). In those circumstances, redacted invoices may still provide the type of meaningful detail contemplated by *Rohrmoos*—including information regarding tasks performed, time spent, and billing rates—without requiring disclosure of privileged litigation strategy.

Additionally, before and after *Rohrmoos*, courts of appeals have held that, "[w]hen determining an appropriate fee award, the trial court is entitled to examine the entire record and to view the matter in light of the amount in controversy, the nature of the case, and his or her personal experience as a lawyer or judge." *Iola Barker v. Hurst*, 632 S.W.3d 175, 193–94 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (citing *Land v. Land*, 561 S.W.3d 624, 639 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (internal quotations omitted); *see also Jarvis v. Rocanville Corp.*, 298 S.W.3d 305, 318 (Tex. App.—Dallas 2009, pet. denied) ("The court can also look at the entire record, the evidence presented on reasonableness, the amount in controversy, the common knowledge of the participants as lawyers and judges, and the relative success of the parties."); *Keith v. Keith*, 221 S.W.3d 156, 169 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

V. FEE SEGREGATION

A party claiming attorney's fees must segregate the fees attributable to claims for which fees are recoverable from those attributable to claims for which they are not. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313 (Tex. 2006); *see also Transcor Astra Group S.A. v. Petrobras Am. Inc.*, 650 S.W.3d 462, 482 (Tex. 2022), reh'g denied (Sept. 2, 2022). However, when discrete legal services advance both a recoverable and an unrecoverable claim to the point that they are inextricably intertwined, segregation is not required. *Chapa*, 212 S.W.3d at 313–14. In *Stewart Title Guaranty Co. v. Sterling,* the Court stated that "when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are `intertwined to the point of being inseparable,' the party suing for attorney's fees may recover the entire amount covering all claims." 822 S.W.2d 1, 11 (Tex. 1991). In 2006, the *Chapa* Court qualified *Sterling:* "[t]o the extent *Sterling* suggested that a common set of underlying facts necessarily made all claims arising therefrom `inseparable' and all legal fees recoverable, it went too far." 212 S.W.3d at 313. It held that "[i]ntertwined 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." *Id*. at 313–14.

The rationale is straightforward: fee-shifting statutes authorize recovery only for work done in connection with the compensable claim. Importantly, a fee claimant who fails to segregate at trial will face a remand for a new damages trial on the issue. *Chapa*, 212 S.W.3d at 314.

Courts have held, though, that there is no need to segregate between separate factual theories of recovery supporting a single cause of action. *See Solar Soccer Club v. Prince of Peace Lutheran Church of Carrollton*, 234 S.W.3d 814, 829 n.2 (Tex. App.—Dallas 2007, pet. denied) ("Segregation based on separate theories of the same cause of action is not required."); *Imagine Auto. Grp. v. Boardwalk Motor Cars, Ltd.*, 430 S.W.3d 620, 649 (Tex. App.—Dallas 2014, pet. denied) ("Appellants' cases do not stand for the proposition that fees must be segregated among individual facts in a single TTLA claim"); *accord Flagship Hotel, Ltd. v. City of Galveston*, 117 S.W.3d 552, 565 & n.6 (Tex. App.—Texarkana 2003, pet. denied).

Additionally, no segregation is required for fees incurred to overcome affirmative defenses regarding a fee-sustaining claim. *Namdarkhan v. Glast, Phillips & Murray, P.C.*, No. 05-18-00802-CV, 2020 WL 1969507, at *11 (Tex. App.—Dallas Apr. 24, 2020, pet. denied) (mem. op.) (citing *Chapa,* 212 S.W.3d at 314). "Likewise, fees incurred to overcome counterclaims intended to defeat a full recovery on the fee-sustaining claim require no segregation." *Id*. "Thus, instances in which `a defendant alleges the same theory as both an affirmative defense and a counterclaim in an effort to reduce or eliminate the plaintiff's recovery on a contract claim,' require no segregation." *Id*. (quoting *Transcon. Realty Inv., Inc. v. McGuire, Craddock, Strother & Hale, P.C.*, No. 05-09-00884-CV, 2011 WL 1493985, at *5 (Tex. App.—Dallas Apr. 20, 2011, pet. denied) (mem. op.)). "Similarly, if work served the prosecution of a claim on which fees are recoverable as well as claims on which fees are not recoverable, segregation is not required." *Id.*

Strict segregation is also not always required in cases involving multiple parties. *See Whallon v. City of Hous.*, 462 S.W.3d 146, 168 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). In *Whallon,* the court upheld a fee award in a case involving multiple defendants based on testimony from an attorney that, for each defendant, "the work that we did was inextricably intertwined. ... There's one set of facts and circumstances here, one cause of action alleged against everyone." *Id*. Under these conditions, the court of appeals held that the evidence was sufficient to support the trial court's decision to apportion the total fee award equally against each defendant, without requiring segregation "on a defendant-by-defendant basis." *Id*. But if a party is asserting different claims against different defendants, segregation would be required. *See, e.g., Brown v. Zimmerman*, 160 S.W.3d 695, 705 (Tex. App.—Dallas 2005, no pet.).

In terms of burden of proof and procedure, "[t]he party seeking to recover attorney's fees bears the burden of demonstrating segregation is not required." *Clearview Props., L.P. v. Prop. Tex. SC One Corp.*, 287 S.W.3d 132, 144 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). But if an opposing party fails to object to the failure to segregate in the trial court, any error is waived. *See Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997); *Air Jireh Serv.*, 2019 WL 3023315, at *4; *Vines v. Durrett*, No. 12-14-00258-CV, 2015 WL 9591525, at *6 (Tex. App.—Tyler Dec. 30, 2015, pet. denied) (mem. op.). Additionally, the need to segregate attorney's fees is a question of law, while the extent to which claims can or cannot be segregated is a mixed question of law and fact. *Chapa*, 212 S.W.3d at 313. Finally, if the movant carries its burden of showing that segregation was required, only then does a court examine the legal and factual sufficiency of the evidence supporting an award. *Namdarkhan*, 2020 WL 1969507, at *9. Notably, a failure to segregate does not preclude an attorney's fee recovery. *Kinsel v. Lindsey*, 526 S.W.3d 411, 428 (Tex. 2017). "The issue may be remanded to the trial court for reconsideration with sufficiently detailed information for a meaningful review of the fees sought." *Id*. (citation omitted). As the Supreme Court explained in *Chapa:* "Unsegregated attorney's fees for the entire case are some evidence of what the segregated amount should be. We have applied this same rule for lost profits, medical expenses, and attorney's fees—an unsegregated damages award requires a remand." 212 S.W.3d at 314.

Multiple cases demonstrate that parties are still failing to properly segregate. *See, e.g., Vaughan v. Medina*, No. 13-18-00266-CV, 2020 WL 1951441 (Tex. App.—Corpus Christi Apr. 23, 2020, pet. denied) (mem. op.) (legally sufficient evidence supported fee award, but court could not discern how much time party spent on an abandoned tort claim for which fees were not recoverable and therefore remanded to determine segregation); *Khoury v. Tomlinson*, 518 S.W.3d 568, 580-81 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet.) (testimony that facts were intertwined does not show that legal services were intertwined); *Thunder Rose Enters., Inc. v. Kirk*, No. 13-15-00431-CV, 2017 WL 2172468, at *15 (Tex. App.—Corpus Christi Apr. 20, 2017, pet. denied) (mem. op.) (rejecting fee affidavit that did not state that the fees requested were attributable to any particular cause of action, nor did it state that any particular services advanced both recoverable and unrecoverable claims); *Fix It Today, LLC v. Santander Consumer USA, Inc.*, No. 02-14-00191-CV, 2015 WL 2169301, at *7 (Tex. App.—Fort Worth May 7, 2015, no pet.) (mem. op.) (rejecting fee affidavit stating that the legal services rendered for recoverable and unrecoverable claims were "indistinguishable" and "so intertwined that they need not be segregated"); *Arrow Marble, LLC v. Estate of Killion*, 441 S.W.3d 702, 708 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Contemporary Contractors, Inc. v. Centerpoint Apt. Ltd. P/S*, No. 05?13-00614-CV, 2014 WL 3051321, at *7 (Tex. App.—Dallas July 3, 2014, no pet.) (mem. op.); *but see McCoy v. Van Sickle*, No. 14-24-00501-CV, 2026 WL 1004268, at *5 (Tex. App.—Houston [14th Dist.] Apr. 14, 2026, no pet. h.) (holding evidence of segregation was legally and factually sufficient).

Such reversals can easily be avoided. An expert citing a percentage amount of segregable fees is permissible. *See, e.g., State Farm Lloyds v. Hanson*, 500 S.W.3d 84, 103 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (attorney testimony that 95 percent of the attorney's fees was for work related directly to prosecuting her contract claim or for work that was so intertwined with that claim was sufficient); *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 127 (Tex. App.—El Paso 2015, pet. denied); *Bennett v. Grant*, 460 S.W.3d 220, 242 (Tex. App.—Austin 2015, *aff'd in part, rev 'd in part,* 525 S.W.3d 642 (Tex. 2017) ("Submitting to the jury an attorney's testimony concerning the percentage of hours relating to specific claims—even a percentage as high as 95%—is sufficient to satisfy a party's burden to segregate its attorney's fees.").

Avoid two simple pitfalls:

- Conclusory invocation without proof. An attorney's statement that 'the services are so intertwined that they cannot be segregated' is, standing alone, legally insufficient. The fee claimant must affirmatively demonstrate that the specific tasks performed actually advanced both a recoverable and an unrecoverable claim. The conclusory statement gets the analysis backward—it is the conclusion, not the evidence.

- Overbroad characterizations of "intertwinement.' Pleading and discovery tasks that relate to both types of claims are sometimes recoverable without segregation. But tasks that are exclusive to an unrecoverable claim—e.g., a medical records subpoena in a personal injury fraud case, depositions of liability witnesses for a tort claim, briefing of a legal standard specific to a non-contract claim—must be segregated regardless of whether the overall litigation involved mixed claims.

VI. APPELLATE ATTORNEY'S FEES

A party that prevails on a fee-bearing claim is generally entitled to recover not only its trial-level fees but also reasonable fees incurred in defending or prosecuting the appeal. While *Rohrmoos* did not specifically address prospective appellate attorney's fees, the Supreme Court has since clarified in *Yowell v. Granite Operating Co.* that the *Rohrmoos* factors apply differently since those fees have not yet been incurred. 620 S.W.3d 335 (Tex. 2020). Thus, under *Yowell,* a party seeking conditional appellate fees must provide expert opinion testimony about the services it reasonably believes will be necessary to handle the appeal, the attorneys to be involved, the hours likely to be required, and a reasonable hourly rate for those services. *See, e.g., Apple Tex. Rests., Inc. v. Shops Dunhill Ratel, LLC*, No. 05-20-01052-CV, 2022 WL 883907, at *6 (Tex. App.—Dallas Mar. 25, 2022, pet. denied), reh'g denied (May 25, 2022).

Courts of appeals have recently applied the Supreme Court's decision in *Yowell,* recognizing that conditional appellate fees need not address all *Rohrmoos* factors. *Johnson v. Bearfoot Companies, LLC*, No. 02-23-00366-CV, 2024 WL 2202033, at *10 (Tex. App.—Fort Worth May 16, 2024, no pet.) (citing *Rohrmoos*, 578 S.W.3d at 498); *Hizar v. Heflin*, 672 S.W.3d 774, 803 (Tex. App.—Dallas 2023, pet. denied) (addressing conditional post-trial and appellate attorney's fees). "Because an award of conditional appellate attorney's fees depends on the outcome of the appeal and is not a final award until an appellate court issues its final judgment, the full evidentiary requirements of *Rohrmoos* are not implicated." *Porter v. Porter*, No. 04-20-00229-CV, 2021 WL 2117923, at *4 (Tex. App.—San Antonio May 26, 2021, no pet.) (mem. op.). Courts of appeals have applied "a slightly different analysis to consider the sufficiency of the evidence regarding appellate attorney's fees." *Footy Rooty Dev., Inc. v. Doe (M.D.)*, No. 13-23-00413-CV, 2025 WL 3764017, at *9 (Tex. App.—Corpus Christi–Edinburg Dec. 30, 2025, no pet.) (citing *Yowell*, 620 S.W.3d at 354–55). A lodestar analysis is not required for appellate attorney's fees "because they have not yet been incurred and must be based on a projected estimate" and "[t]here is no certainty regarding who will represent the appellee in the appellate courts, what counsel's hourly rate(s) will be, or what services will be necessary to ensure appropriate representation in light of the issues the appellant chooses to raise." *Id.* (citing *Yowell*, 620 S.W.3d at 355).

However, a party seeking to recover conditional appellate attorney's fees still must "provide opinion testimony about the services it reasonably believes will be necessary to defend the appeal and a reasonable hourly rate for those services." *Yowell*, 620 S.W.3d at 355. Thus, a party may not simply request a lump-sum award on appeal. Instead, a party should identify the time assigned to each task required to defend on appeal. *See Hizar v. Heflin*, 672 S.W.3d 774, 803 (Tex. App.—Dallas 2023, pet. denied); *Canadian Real Estate Holdings, LP v. Karen F. Newton Revocable Tr.*, No. 05-20-00747-CV, 2022 WL 4545572, at *5–6 (Tex. App.—Dallas Sept. 29, 2022) (mem. op.), decision clarified on denial of reh'g, No. 05-20-00747-CV, 2023 WL 2909179 (Tex. App.—Dallas Apr. 12, 2023, no pet.) (mem. op.). Additionally, a party should provide an estimate that encompasses the various contingencies that may arise on appeal. For example, the fact that oral argument might not be granted in a case appealed to the court of appeals. *See Rohrmoos*, 578 S.W.3d at 498; *C&C Rd. Constr., Inc. v. SAAB Site Contractors, L.P.*, 574 S.W.3d 576, 594 (Tex. App.—El Paso 2019, no pet.) (remanding contingent appellate fees back to the trial court because the fees testimony failed to address oral argument separate from briefing).

The Texas Supreme Court has recently addressed the issue in *Gopalan v. Marsh*, No. 25-0161, 2026 WL 1445580, at *7 (Tex. May 22, 2026). The case arose from a contentious divorce in which the trial court entered three distinct fee-related rulings: (1) it ordered each party to bear its own trial attorney's fees; (2) it awarded the wife $80,000 in conditional appellate fees; and (3) it credited $117,411.02 of the wife's trial fees against the community estate as part of the just-and-right property division, expressly attributing that amount to the husband's "unnecessary escalation of litigation." The Texas Supreme Court reversed on the principal issue—a possession order that contravened the jury's verdict on primary residence—and considered whether that reversal required redetermination of the fee awards. On the conditional appellate fees, the Court reversed and remanded. Because the husband prevailed in part, the wife was not entitled to the full $80,000 award—but she remained entitled to fees attributable to the appellate issues on which she prevailed. The Court noted that the fee evidence at trial failed to segregate fees by issue, making remand necessary for the trial court to determine the recoverable amount.

Similarly, the Fourteenth Court of Appeals in *Southwest Sunrise, LLC v. John Gannon, Inc.*, No. 14-25-00237-CV, 2026 WL 1144472 (Tex. App.—Houston [14th Dist.] Apr. 28, 2026, no pet. h.) held that a prevailing appellee may not recover the full amount of conditional appellate attorney's fees when the appellant achieved partial success on appeal. Because Southwest had prevailed on two of four issues in the prior appeal—obtaining reversal of the injunctive relief and the original chapter 38 fee award—Gannon was not entitled to the full $30,000 in appellate fees the trial court awarded. The court reiterated that an appellee must segregate appellate fees between issues on which the appellant succeeded and issues on which it did not.

VII. DETERMINATION BY TRIAL OR SUMMARY JUDGMENT

A. Determination of Attorney's Fees by Trial

The amount of reasonable and necessary attorney's fees is generally a matter of determination by a fact finder (i.e., the jury). *See City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 367 (Tex. 2000); *Bocquet*, 972 S.W.2d at 21. A party's failure to timely object to the submission of attorney's fees to the court waives any complaint to that procedure on appeal. *See Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC*, No. 05-14- 00299-CV, 2015 WL 1519667, at *5 (Tex. App.—Dallas Apr. 1, 2015, pet. denied) (mem. op.); *Arredondo v. Betancourt*, 383 S.W.3d 730, 746 (Tex. App. Houston [14th Dist.] 2012, no pet.). Additionally, it is important to submit evidence of attorney's fees before the end of trial. *See Adiuku v. Ikemenefuna*, No. 14-13-00722-CV, 2015 WL 778487, at *11–12 (Tex. App.—Houston [14th Dist.] Feb. 24, 2015, no pet.) (mem. op.) (reversing fee award based on post-trial fee affidavit when the record failed to establish that the parties agreed to submit the issue of fees to the bench after the conclusion of trial, or that they stipulated to the amount, reasonableness, or necessity of any fees).

The parties can agree to address attorney's fees after trial, but it should be clear and in writing exactly what post-trial evidentiary proceedings will entail. Specifically, the parties should address whether pre-trial deadlines, including for discovery and disclosure, apply. Failure to do so can create confusion and additional issues on appeal regarding whether the attorney's fee evidence was exchanged in a timely manner.

The Texas Supreme Court has concluded that the trial court—not a jury—has discretion to determine the appropriate amount of fees when they are awarded as sanctions. *See Brantley v. Etter*, 677 S.W.2d 503, 504 (Tex. 1984) (per curiam). Depending on the language of the statute, other contexts also permit a court—rather than a jury—to determine the amount of reasonable attorney's fees as a factual matter. *Meyers v. 8007 Burnet Holdings, LLC*, 600 S.W.3d 412, 430 & n.15 (Tex. App.—El Paso 2020, pet. denied) (reasoning Property Code provision provided that the court shall allow prevailing party to recover fees based on four factors that the "court shall consider," only the trial court—and not the jury—could determine the reasonable amount of fees under that provision).

B. Determination of Attorney's Fees by Summary Judgment

While the reasonableness of attorney's fees is generally a fact issue, an award of fees may be appropriate in a summary judgment proceeding if both a party's entitlement to fees and the appropriate amount of fees is established as a matter of law. *Haden v. David J. Sacks, P.C.*, 332 S.W.3d 503, 512–15 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). If the evidence does not conclusively establish the reasonableness and necessity of the amount of fees, summary judgment is inappropriate. *See Goehrs v. U.S. Specialty Ins. Co.*, No. 14-18-00240-CV, 2019 WL 7372053, at *6 (Tex. App.—Houston [14th Dist.] Dec. 31, 2019, no pet.) (mem. op.); *see Stavron v. SureTec Ins. Co.*, No. 02-19-00125-CV, 2019 WL 6768125, at *6–7 (Tex. App.—Fort Worth Dec. 12, 2019, no pet.) (mem. op.). This is also true when the attorney's affidavit is not clear about the method used to determine fees. *Great Am. Lloyds*, 596 S.W.3d at 378.

C. Legal Sufficiency of the Evidence

Even if an award of attorney's fees was not supported by legally sufficient evidence at trial, appellate courts in recent years have generally reversed and remanded—so long as there is some evidence in the record supporting a fee award.

"Generally, if an appellate court holds there is legally insufficient evidence to support a judgment after a trial on the merits, the proper disposition is to reverse and render judgment." *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 929 (Tex. 2009) (per curiam) (citations omitted). But appellate courts have continued to hold that they have broad discretion to remand for a new trial on attorney's fees even where the evidence of fees was legally insufficient. *See, e.g., Rohrmoos*, 578 S.W.3d at 506; *Long v. Griffin*, 442 S.W.3d 253, 256 (Tex. 2014) (per curiam).

When an attorney's fees award was not mandatory under a governing statute, though, at least one court has stated that it could not remand for a redetermination of fees on grounds of at least some evidence supporting a fee award. *Interest of K.A.M. S.*, 583 S.W.3d 335, 350 (Tex. App.—Houston [14th Dist.] 2019, no pet.). Still, the court elected to remand in the interest of justice, given *Nath's* longstanding abrogation of the attorney's fee sanction precedent while the appeal was pending. *Id*. (citing *Nath v. Texas Children's Hospital (Nath II)*, 576 S.W.3d 707, 709–10 (Tex. 2019) (per curiam).

If there is legally and factually sufficient evidence to support some amount of the attorney's fees awarded, but not the full amount in the judgment, a party could ask the court of appeals to suggest a remittitur. *See Enzo Invs., LP v. White*, 468 S.W.3d 635, 655 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (remitting the portion of fees attributable to one attorney's legally insufficient affidavit); *Corral-Lerma*, 467 S.W.3d at 127 (offering a remittitur between the amount of fees awarded by the jury and the maximum award supported by legally and factually sufficient evidence). This allows the court of appeals to reduce the award to an amount supported by sufficient evidence and to avoid a remand on fees.

VIII. OFFER OF SETTLEMENT

If a party makes an offer of settlement under Texas Rule of Civil Procedure 167 and the judgment to be awarded on monetary claims is ultimately "significantly less favorable" than the offer, then the court "must award" the offeror litigation costs, including reasonable attorney's fees, "from the time the offer was rejected to the time of judgment." Tex. R. Civ. P.167.4(a), (c). A judgment award on monetary claims is "significantly less favorable" than an offer to settle those claims if: "(1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or (2) the offeree is a defendant and the judgment would be more than 120 percent of the offer." *Id*. at R. 167.4(b). Litigation costs awarded to a defendant must be made as a setoff to the plaintiff's judgment against the defendant. *Id*. at R. 167.4(g).

The language of Rule 167 is mandatory—if its conditions are satisfied, the trial court "must award" litigation costs. *Id*. at 167.4(a); *see also May v. Ticor Title Ins.*, 422 S.W.3d 93, 103–04 (Tex. App.—Houston [14th Dist.] 2014, no pet.). But the San Antonio Court of Appeals has recognized that the court still has discretion under Rule 167 to determine the proper *amount* of fees. *See United Parcel Serv., Inc. v. Rankin*, 468 S.W.3d 609, 628 (Tex. App.—San Antonio 2015, pet. denied). It also held that the statutory reference to an award of fees "from the time the offer was rejected *to the time of judgment,"* refers to the trial court's judgment and thus does not require the award of conditional appellate fees in connection with an offer of judgment. *Id*.

IX. ATTORNEY'S FEES AS SANCTIONS

There are various statutes and rules that allow sanctions to be awarded. *See, e.g.,* Tex. Civ. Prac. & Rem. Code § 10.002 (pleadings filed with an improper purpose or lack of legal or factual support); Tex. R. Civ. P. 13 (pleadings that are groundless and filed in bad faith or with the intention to harass); Tex. R. Civ. P. 215 (sanctions for discovery abuse). The requirements for an award of attorney's fees as sanctions are different under each provision, so it is important to study each rule or statute individually. In recent years, the Texas Supreme Court has issued opinions regarding awards of attorney's fees as sanctions—most notably in the ongoing dispute between Dr. Rahul Nath and Texas Children's Hospital and Baylor College of Medicine.

In the first *Nath* opinion, the Texas Supreme Court reversed and remanded an award of $1.4 million in attorney's fees as sanctions against Dr. Nath for filing frivolous pleadings. *Nath v. Tex. Children's Hosp. (Nath I),* 446 S.W.3d 355 (Tex. 2014). It reasoned that the trial court had failed to consider the extent to which the defendant's own conduct had contributed to the fees in question. The defendants waited years after the lawsuit was initiated to file a motion for summary judgment, claiming that the suit was barred by limitations. The Court concluded: "[I]f issues asserted in pleadings are revealed to be frivolous, and the defending party delays moving for summary judgment and sanctions, the defending party adopts some responsibility for the overall increase in litigation costs." *Id*. at 372.

On remand, the prevailing parties' attorneys submitted affidavits, asserting they did nothing to prolong the suit or unnecessarily increase their fees. The affidavits stated the total amounts billed to their clients in defending against the suit. The trial court found the evidence sufficient and reassessed the same $1.4 million sanction. Dr. Nath again appealed, arguing the affidavits were insufficient to prove the sanction was a reasonable and necessary attorney's fee. The Texas Supreme Court granted review.

In the second *Nath* opinion, the Supreme Court again reversed and remanded. *Nath v. Tex. Children's Hosp. (Nath II),* 576 S.W.3d 707 (Tex. 2019) (per curiam). The Hospital and Baylor argued that a standard other than the typical reasonableness standard applied to attorney's fees awarded as sanctions. Indeed, many courts of appeals had *not* required proof of necessity or reasonableness when assessing attorney's fees as sanctions. *See id*. at 709. The Supreme Court then disagreed with this precedent. Relying on its recent *Rohrmoos* decision, the Supreme Court concluded the Hospital and Baylor had the burden of proving the reasonableness and necessity of their attorney's fees awarded as sanctions. *Id.* at 709–10. "Although this case deals with attorney's fees awarded through a sanctions order, the distinction is immaterial because all fee-shifting situations require reasonableness." *Id*. at 710. The Court further concluded that the Hospital and Baylor's attempt to prove attorney's fees "by submitting two additional conclusory affidavits" that "merely reference the fees without substantiating either the reasonable hours worked or the reasonable hourly rate" provided legally insufficient evidence to support the fee award. *Id*. The Court again remanded the case to the trial court.

Notably, in an opinion issued three years earlier, the Texas Supreme Court had reversed a sanctions award on grounds that it was an "arbitrary fine without evidentiary support." *Christus Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 539–41 (Tex. 2016). The Court reasoned that "when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *Id*. at 540. *Nath II* provided clarification regarding the standard for recovering attorney's fees as a sanction by applying the "reasonableness" standard and evidentiary requirements established in *Rohrmoos.*

On remand, following an evidentiary hearing, the trial court reassessed the same $1.4 million sanction and awarded the Hospital an additional amount as appellate attorney's fees. The court of appeals affirmed. *Nath v. Tex. Children's Hosp.*, Nos. 14-19-00967-CV & 14-20-00231-CV, 2021 WL 451041 (Tex. App.—Houston [14th Dist.] Feb. 9, 2021, pet. denied [No. 21-0547]). Dr. Nath's petition for review was denied by the Texas Supreme Court, with two justices dissenting. *See Nath v. Tex. Children's Hosp.*, 660 S.W.3d 521, 522 (Tex. 2022) (Devine, J., dissenting, joined by Busby, J.) (dissenting to denial of petition for review because Court denied petition asserting "Nath's jury-trial demand was denied").

X. ATTORNEY'S FEES AS DAMAGES

Recently, the Texas Supreme Court addressed a question of first impression in *Wang v. Whittenburg*, No. 25-0350, 2026 WL 1355074 (Tex. May 15, 2026): can attorney's fees incurred in prior litigation constitute recoverable damages for breach of a settlement agreement?

The case arose from a decades-long dispute among trust beneficiaries over the partition of a 200,000-acre ranch. After signing a Compromise Settlement Agreement (CSA) requiring cooperation in partitioning the land, one group of descendants (Angela Kate) filed partition proceedings in New Mexico. The other group (John Burk) contested the partition despite having contractually agreed to it, causing Angela Kate to incur $216,112 in excess attorney's fees in the New Mexico litigation. Angela Kate then brought a breach-of-contract suit in Randall County, Texas (as required by the CSA's forum-selection clause), seeking those excess fees as actual breach-of-contract damages. The trial court found a breach and causation but awarded no damages, concluding that the American Rule barred recovery.

The Court held it does not. As supported by prior precedent, attorney's fees paid in prior litigation can constitute compensatory damages when they are the measure of economic harm caused by a defendant's wrongful conduct, rather than fees sought to prosecute the current suit. The Court extended that reasoning to breach of settlement agreements, noting that such agreements—unlike ordinary contracts—are uniquely aimed at ending litigation, so their breach often produces no damages other than attorney's fees in further proceedings. Barring recovery in that circumstance would leave the non-breaching party without any remedy and would undermine Texas's strong policy favoring settlement. The Court drew the line, however, at the "single-action rule": a plaintiff cannot recover prior litigation fees as damages when the breach was a basis for that prior litigation, because that would effectively allow end-runs around the American Rule.

Because John Burk's breach—his opposition to the partition—did not occur until after the New Mexico litigation was already underway, it was not a basis for that proceeding. Angela Kate was therefore entitled to $216,112 in excess fees as actual breach-of-contract damages. That damages recovery in turn unlocked § 38.001(b)(8) attorney's fees for the Texas suit, since Angela Kate both prevailed on a breach-of-contract claim and recovered damages. However, the Court declined to render judgment on the § 38.001 fee amount ($711,531.83 sought), remanding instead for the trial court to reconsider reasonableness in light of the *Rohrmoos* lodestar framework and the "degree of success obtained"—identified as the most critical factor—now that the results obtained had materially changed from the take-nothing posture that existed below.

XI. INTEREST ON ATTORNEY'S FEES

Texas cases have denied claims for prejudgment interest on an award of attorney's fees in the judgment. *See, e.g., Hervey v. Passero*, 658 S.W.2d 148 (Tex. 1983) (per curiam). However, there is a split of authority among Texas courts of appeals regarding whether prejudgment interest can be recovered on attorney's fees paid *before* judgment. *See Apache Corp. v. Castex Offshore, Inc.*, 626 S.W.3d 371, 384 (Tex. App.—Houston [14th Dist.] 2021, pet. filed) (discussing split of authority). *Compare Power Reps, Inc. v. Cates*, No. 01-13-00856-CV, 2015 WL 4747215, at *22–23 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.); *and Carbona v. CH Med., Inc.*, 266 S.W.3d 675, 688 (Tex. App.—Dallas 2008, no pet.) (pre-judgment interest cannot be recovered on attorney's fees under any circumstances); *with Alma Invs., Inc. v. Bahia Mar Co-Owners Ass 'n, Inc.*, 497 S.W.3d 137, 146 (Tex. App.—Corpus Christi 2016, pet. denied) ("prejudgment interest is recoverable on attorney's fees that have been paid prior to the entry of judgment"); *and Nova Cas. Co. v. Turner Constr. Co.*, 335 S.W.3d 698, 706 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (affirming pre-judgment interest on attorney's fees that the defendant had already paid prior to the trial court's entry of judgment); *and Williams v. Colthurst*, 253 S.W.3d 353, 362 (Tex. App.—Eastland 2008, no pet.); *A.V.I., Inc. v. Heathington*, 842 S.W.2d 712, 717 (Tex. App.—Amarillo 1992, writ denied).

Generally, post-judgment interest accrues from the date of the trial court's judgment on the entire amount of a money judgment. *See Hot-Hed*, 333 S.W.3d at 734–35. There is an exception. In *Ventling v. Johnson,* the Texas Supreme Court resolved a split among the lower courts by holding that "an award for conditional appellate attorney's fees accrues post judgment interest from the date the award is made final by the appropriate appellate court's judgment." 466 S.W.3d 143, 156 (Tex. 2015). This "presents a limited exception to the general rule that the `judgment' for post judgment interest purposes is the trial court's judgment." *Id*.

XII. ATTORNEY'S FEES RECOVERY AND GENERATIVE AI

As discussed above, the decision in *Rohrmoos*, with its requirements regarding the specificity of evidence and calculation under the lodestar method, provides the standard for recovering attorney's fees under a contract or most Texas statutes. But for how long? Lawyers and law firms are rapidly adopting generative artificial intelligence ("AI") to practice law. This use has the potential to significantly affect the billing model under the hourly fee. The decision in *Rohrmoos* contemplates that a reasonable attorney's fee is based on the ***time*** an attorney spends on a specific task. Additional considerations include the attorney's experience and the complexity of the case. But in a world where generative AI ("GAI") is performing many of the tasks, the time spent by an attorney—of any experience—utilizing that tool is greatly reduced. Certainly, an attorney with appropriate experience should review and confirm the accuracy and acceptability of any generative AI work. That is a clear ethical obligation. Yet, at the end of the day, the time spent on the project—when an attorney uses generative AI—will be significantly less. The question then becomes whether a reasonable fee will still be "reasonable" when the time spent on the project is substantially less than it would be without a generative AI tool.

There is also an open question as to how AI-assisted legal work should be treated in the lodestar calculation. Currently, there is no settled Texas authority, but practitioners can anticipate further developments on this issue in state and federal courts.

A. ABA Formal Opinion 512 and Generative AI Fees

The American Bar Association ("ABA") released a formal opinion on generative AI in July 2024. While Texas attorneys are not required to follow such opinions, the opinion provides useful guidance. While the opinion addresses many aspects of generative AI (confidentiality, competency, etc.), this paper focuses on the section on attorney's fees.

ABA Formal Opinion 512 confirms that Model Rule 1.5 governs attorney's fees and expenses arising from the use of generative AI. Under Rule 1.5(a), all fees and expenses must be reasonable, and Rule 1.5(b) requires lawyers to communicate the basis for those charges to the client, preferably in writing, before or within a reasonable time after the representation begins. Accordingly, before charging a client for generative AI tools or services, a lawyer must clearly explain how those charges will be assessed.

Under this opinion, for matters billed on an hourly basis, lawyers may charge only for the actual time expended, even when GAI increases efficiency. Consistent with prior ABA opinions, a lawyer may bill for time spent inputting prompts and reviewing, editing, and verifying GAI-generated work product, but may not bill for time saved through automation or for hours not actually worked. Increased efficiency does not permit inflation of billable time; the objective remains compensation only for time reasonably expended on the client's behalf.

Further, the opinion explains that expenses related to generative AI must likewise be reasonable and generally limited to actual out-of-pocket costs, without undisclosed markups or surcharges. In determining whether AI-related costs may be passed on to clients, lawyers must evaluate the nature of the tool used. Generative AI that functions as part of a firm's ordinary technology infrastructure—such as tools embedded in word-processing software—should ordinarily be treated as overhead and not billed separately, absent advance disclosure. By contrast, third-party generative AI services billed on a per-use basis for a specific client matter may be charged as expenses reflecting the actual cost incurred. For proprietary or in-house generative AI tools, firms may recover only direct costs plus a reasonable allocation of associated expenses unless a different arrangement is agreed upon in advance. As the opinion discusses, lawyers may also not bill clients for time spent learning to use generative AI tools, as maintaining technological competence is a professional obligation, unless the client specifically requests a particular tool and agrees to the billing terms.

B. Other bar association opinions

Both the Florida and D.C. Bar have weighed in on this issue, and their opinions are consistent with the ABA opinion.

- ***Florida***

Florida was the first state to issue an ethics opinion on generative AI. In Florida Bar Ethics Opinion 24-1 (January 19, 2024) (available at https://www.floridabar.org/etopinions/opinion-24-1/), the opinion explains that lawyers may not charge illegal, excessive, inflated, or duplicative fees and costs, and these same principles apply when lawyers use generative AI in client matters. Although generative AI may increase efficiency, lawyers should not use that efficiency to justify overstating billable time or otherwise inflating fees, and they should consider alternative billing structures, such as flat fees or contingent arrangements, so that both the lawyer and client benefit from the technology's efficiencies. The opinion further provides that lawyers may charge clients only for the actual costs of generative AI incurred on the client's behalf, and any AI-related expense that cannot be specifically attributed to a client matter must instead be treated as firm overhead rather than prorated among clients. Lawyers are also expected to disclose to clients, preferably in writing, any intent to charge for the use of generative AI and must ensure that all such charges are reasonable and nonduplicative. Consistent with existing rules governing research and training, lawyers may bill for reasonable time spent performing case-specific research or drafting with the assistance of generative AI, but they may not charge clients for time spent acquiring basic competence or learning how to use the technology. Finally, the opinion reiterates that charges for nonlawyer or outsourced services—including AI-assisted work—cannot be separately billed when those services are already reflected in overhead or are ordinarily encompassed within the lawyer's standard fee arrangement.

- ***D.C.***

In DC Bar Ethics Opinion 388, the opinion begins with its Rule 1.5(a) (addressing fees). Under Rule 1.5(a), a lawyer's fee must be reasonable, and if the lawyer intends to bill the client for generative AI use that carries an out-of-pocket cost, which expected expense must be communicated to the client. Where a fee agreement is based exclusively on time spent, the lawyer may bill only for time actually expended, even if generative AI reduces the time required to complete the work. The economies achieved through generative AI use inure to the benefit of the client, not the lawyer — a principle the opinion grounds in prior DC ethics guidance on hourly billing. A lawyer cannot charge separately for the perceived value of AI-generated work product absent a fee agreement that permits value-based or flat-fee billing. The reasonable cost of the generative AI subscription or service itself may be passed through as an expense item only if the client's fee agreement permits billing for such out-of-pocket expenses.

C. Texas Ethics Opinion 705

The Texas Committee on Professional Ethics issued an opinion concerning generative AI in February 2025. Tex. Comm. On Professional Ethics, Op. 705 (2025) (available at https://www.legalethicstexas.com/resources/opinions/opinion-705/).

On the topic of fees, the opinion recognized that "generative AI tools might impact the fees that lawyers charge—after all, one of the most promising aspects of these tools is the possibility for lawyers to provide legal services more efficiently." The opinion suggested a lawyer likely will be able to charge the client for actual time spent using generative AI for purposes of representation, including checking the work, but "a lawyer may not, however, charge hourly fees for the time that was 'saved' by using the generative AI program," relying on the ABA, D.C., and Florida opinion. A lawyer can, per the opinion, collect AI-related expenses from the client if the client accepts that arrangement, including possible per-use fees. However, the lawyer will generally not be permitted to recover more than the amount of expenses actually incurred and paid to the generative AI provider.

D. The Future?

We cannot yet know the impact of generative AI on various areas of the law, including attorney's fees recovery, as its use and capabilities are rapidly changing. But as more legal professionals incorporate its use into their practice, we are likely to see novel questions develop in cases where attorney's fees recovery is at issue. As it becomes more prevalent, generative AI may move the legal profession away from the billable-hour model and towards a "reasonable fee" or flat-fee model that is more task-specific. If so, the question becomes whether generative AI will modify attorney's fees recovery and the *Rohrmoos* calculations. Most likely, *Rohrmoos's* requirements for specificity and supporting evidence explaining the tasks performed will not be impacted by generative AI use.

However, there is a question about whether courts will reduce a party's requested attorney's fees recovery based on AI use. The lodestar method rewards hours worked. If AI tools substantially reduce the time required to complete legal tasks—brief drafting, research, document review, contract analysis—the mechanical application of the lodestar formula will produce a lower fee for the same quality and quantity of work.

Courts may address this dilemma: judges have the discretion to reduce a party's offered lodestar calculations upon finding that AI could have accomplished tasks more efficiently or have questioned the reasonableness of hours that appear inflated relative to the complexity of the work.

Opinions from the Texas Business Court have arguably addressed this issue, reducing an award of attorney's fees awarded to a party having recognized likely prior generative AI use by the party seeking fees.

This paper does not gaze into a crystal ball to make predictions about the next steps, but below are several resources discussing the topic:

- Nancy B. Rapoport & Joseph R. Tiano, Jr., *Fighting the Hypothetical: Why Law Firms Should Rethink the Billable Hour in the Generative AI Era*, 20 Wash. J.L. Tech. & Arts 41 (2025), available at https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2499&context=facpub
- Michele Carney, *Formal Opinion 512 and the Reasonableness of Fees When Using A*I, ABA Law Practice Today (Dec. 16, 2024) (discussing ethical limits on billing for generative AI tools under ABA Formal Opinion 512), available at https://www.americanbar.org/groups/law_practice/resources/law-practice-today/2024/december-2024/the-reasonableness-of-fees-when-using-ai/
- William Josten, *Is ABA Formal Opinion 512 Off the Mark? And If So, What Should Law Firms Do?*, Thomson Reuters Institute (Apr. 2, 2025) (analyzing how Opinion 512 challenges hourly billing models), available at https://www.thomsonreuters.com/en-us/posts/legal/aba-formal-opinion-512/
- *AI Is Making Fixed-Fee Legal Billing Inevitable*, LeanLaw Blog (2025) (arguing that generative AI efficiency and the reasonableness requirement of Opinion 512 accelerate movement toward flat and value-based billing), available at https://www.leanlaw.co/blog/why-ai-may-make-fixed-fee-legal-billing-inevitable/
- Mark C. Palmer, *AI and Legal Billing Practices: Be Reasonable, People!*, Attorney at Work (Jan. 24, 2025) (examining ethical risks of time-based billing when AI reduces attorney labor), available at https://www.attorneyatwork.com/be-reasonable-ai-and-legal-billing-practices/
- The U.S. Legal Market in 2025: The Pricing Paradigm Shifts, Validatum (Feb. 17, 2025) (industry analysis AI pricing pressure and the future viability of the billable hour), available at https://www.validatum.com/the-us-legal-market-in-2025-the-pricing-paradigm-shifts-is-your-firm-ready/
- Legal Ethics Opinion Provides Guidance on Billing for AI Use, Virginia Lawyers Weekly (July 13, 2025) (discussing ABA Opinion 512 and related state ethics opinions addressing AI-related billing practices), available at https://valawyersweekly.com/2025/07/13/virginia-legal-ethics-ai-value-billing/

XIII. CONCLUSION

The issues surveyed in this paper share a common thread: the failure to attend to fee recovery with the same rigor applied to the merits almost always costs the claimant more than it saves in time or effort. Pleading the right statutory basis, segregating fees with care, preserving contingent appellate fee awards, and marshaling sufficient lodestar proof are not technicalities—they are the foundation of a recoverable fee award.

The stakes are not abstract. As *Rohrmoos* itself illustrates, the fee award can easily exceed the underlying recovery, making it a focal point of settlement leverage and appellate strategy alike. A claimant who loses a fee award on legal sufficiency grounds may face nothing more than a remand—but that remand comes at the cost of years of litigation and a fractured case.

Emerging questions—including how courts should treat time spent with AI-assisted research and drafting under the lodestar framework—will test whether existing doctrine is supple enough to accommodate a rapidly changing practice environment. The early signals suggest that courts will scrutinize AI-assisted work the same way they scrutinize any other billing entry: reasonableness and necessity remain the measure, whatever the tool.