United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STEADFAST INSURANCE COMPANY	§	
	§	
V.	§	
	§	
ARCHER D. BONNEMA, JACOB BONNEMA; JOSHUA FINANCIAL CORPORATION	§	CASE NO. 4:11cv146 (Judge Mazzant)
	§	
JACOB BONNEMA Counterclaimant	§	
	§	
V.	§	
	§	
STEADFAST INSURANCE COMPANY Counterdefendant	§	
	§	
ANDREW A. BERGMAN, P.C. Intervenor,	§	
	§	
V.	§	
	§	
STEADFAST INSURANCE COMPANY Defendant in Intervention	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

By order of this Court, a trial was held in this matter on January 9, 2013. The parties appeared before the Court for a bench trial of this case, at which time the Court heard evidence and argument of counsel. The Court now enters its Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52. Any finding of fact which constitutes a conclusion of law shall be deemed a conclusion of law, and any conclusion of law which constitutes a finding of fact shall be deemed a finding of fact. Briefs were filed prior to trial and after trial (Dkt. #55, #64, #66).

Having heard the evidence and taking note of the record, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Background of Case

This is an action to determine the amount of reasonable and necessary attorney's fees incurred in the defense of Jacob Bonnema, Archer Bonnema and Joshua Financial Corporation ("the Bonnemas") in connection with a suit styled: *Claude Young, et. al. v. The Millennium Multiple Employer Welfare Benefit Plan, et. al.*, Cause No. 08-13325 on file in the 95th Judicial District Court of Dallas County, Texas (the "Young Litigation").

A complicating factor to this litigation has been the bankruptcy filing by one of the Defendants, Archer D. Bonnema, in *In Re: Archer Dale Bonnema, Debtor*, Case No.: 11- 41606-btr Chapter 11 on file in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division. Pursuant to this Court's Order dated June 1, 2011, all claims were stayed as to Archer D. Bonnema, pending further Order of the Court. Meanwhile, an agreement has been reached between bankruptcy counsel for Archer D. Bonnema and counsel for Jacob Bonnema and Joshua Financial on how to split any proceeds of recovery of attorney's fees in this case.

Plaintiff/Counterdefendant/Defendant in Intervention, Steadfast Insurance Company ("Steadfast"), brought this Declaratory Judgment Action to seek a judicial declaration regarding certain coverage defenses and that it is only responsible to pay reasonable and necessary attorney's fees attributable to the defense of the Bonnemas in the Young Litigation. Since that time, Defendant Jacob Bonnema filed a Counterclaim and Andrew A. Bergman, P.C. ("Bergman") filed a Petition in Intervention, which seeks payment of the contested attorney's fees and costs.

It is Steadfast's position that the overwhelming and vast majority of the fees and costs sought by the Bonnemas, through their counsel Andrew A. Bergman ("Mr. Bergman"), are either not

attributable to the defense of the Bonnemas and/or are otherwise unreasonable and/or unnecessary. Steadfast points to a letter dated September 19, 2012, where it indicated its willingness to unconditionally tender $13,520 as reasonable and necessary attorney's fees and expenses attributable to Bergman's work in defending the Bonnemas against a cross-claim and counterclaim asserted against them as of April 1, 2010.

Defendant/Counterclaimant contends that a defense is owed and that Steadfast has failed to provide the defense. Defendant/Counterclaimant contends that Steadfast's failure to provide and pay for a defense constitutes breach of contract and violates Plaintiff's/Counterclaimant's common law and statutory duty of good faith and fair dealing. Defendant/Counterclaimant also claims Plaintiff's/Counterdefendant's actions violate the Texas Deceptive Trade Practice and Consumer Protection Act as well as various sections of the Texas Insurance Code.[1] Defendants/Counterclaimant further contend that all attorneys' time and expenses expended in the Young Litigation were, by fact and law, related to the defense of the remaining claims and that such fees were reasonable and necessary.

Bergman alleges that it had a contract with Steadfast whereby Steadfast would pay Bergman $200 per hour per lawyer in the defense of the Bonnemas in the Young Litigation. Bergman agreed with Steadfast to charge $90 an hour for legal assistant time in connection with defending the Bonnemas in the Young Litigation. For the time and expenses billed by Mr. Bergman's firm between December 2008 through March 2010, Steadfast paid Mr. Bergman's firm's bills in their entirety. Bergman contends that none of its bills representing time and expenses expended after

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[1] At trial, Bergman abandoned these other claims and is now only asserting a claim for attorney's fees.

March 31, 2010, have been paid. Bergman contends the failure to pay is a breach of the contract between it and Steadfast.

Background of Young Litigation

The Bonnemas were in the business of selling life insurance. The Bonnemas were sued by numerous purchasers of certain policies of life insurance sold to them by the Bonnemas in conjunction with participation in The Millennium Multiple Welfare Benefit Plan (the "Millennium Plan" or "Plan").

The Millennium Plan was promoted by its developers and certain insurance companies to be a valid 419A multiple employer welfare plan that provided to owner-employees of small businesses a tax-deductible vehicle to fund pre-retirement life and death benefits through the purchase of specific life insurance policies, as well as allowing the participant to convert the insurance policy to obtain post-retirement benefits.

However, the Internal Revenue Service ("IRS") determined that the Plan was not a valid multiple employer welfare plan as set forth in section 419A(f)(6) of the Internal Revenue Code. The IRS began auditing participants and levying substantial penalties and fines.

Litigation erupted as the participants sued the Millennium Plan, its developers, the insurance agents that sold them the insurance policy, their personal financial planners that recommended participation, attorneys, and others involved in the process.

In October 2008, the Bonnemas were sued in the Young Litigation. There were various Plan investor plaintiffs that intervened during the Young Litigation. Ultimately there existed over a hundred parties in the Young Litigation.

The Bonnemas Insurance Policy and Bergman Hired as Counsel

The Bonnemas were covered by "claims made" errors and omissions policies of insurance issued by Steadfast, a member of the Zurich Insurance Group. The first policy was for the policy period July 31, 2007, to July 31, 2008. The second policy was for the policy period July 31, 2008, to July 31, 2009. These policies of insurance required Steadfast to provide a defense for the Bonnemas. The policies of insurance each had a minimum of $2 million.

Each policy of insurance also contained a consent clause wherein the Bonnemas' consent to settle was required before Steadfast could settle the claim. The policies also provided the right to control the defense of the Bonnemas if Steadfast elected to defend them without reserving any policy coverages.

The Bonnemas provided notice to Steadfast of the respective claims within the applicable policy period and/or reporting period. The Steadfast/Zurich Insurance Group provided a defense, under reservation of rights, for the Bonnemas in the Young Litigation until March 31, 2010. The Bonnemas retained the law firm of Andrew A. Bergman P.C., and Jay Gray, of Gray Law, (collectively the "Bergman Firm"). The Bergman Firm entered into an agreement with Steadfast whereby the Bergman Firm agreed to a discounted but blended attorney hourly rate of $200 per hour. Steadfast agreed to pay that rate and also agreed to pay the Bergman Firm's invoices within 45 days of receipt of such invoices. The financial terms of Steadfast agreeing to pay Bergman were reduced to writing in an exchange of letters and emails in December 2008. In essence, Steadfast, while reserving all of its rights, agreed to pay Bergman a blended rate of $200 an hour for attorney time to defend the Bonnemas and, in turn, Bergman agreed to abide by the philosophy, but not the letter, of Zurich's Litigation Guidelines.

Steadfast paid all of the Bergman invoices, without complaint, for invoices reflecting time for the months of October 2008 through March 2010. For its time and expense billed from December 2008 through March 2010, Steadfast paid all of the bills submitted by Bergman in their entirety, approximately $2 million.

Bonnemas Other Defensive Claims and Claims for Affirmative Relief

As of April 1, 2010, the Bonnemas were pursuing claims for affirmative relief from various co-defendants in the Young Litigation and another third party, which was comprised of Millennium Marketing Group, Norman Bevan, Scott Ridge, Guardian Life Insurance Company of America ("Guardian"), Kathy Barrow ("Barrow"), Innovus Financial Solutions, Inc. and Whitaker, Chalk, Swindle and Sawyer, L.L.P. (the "MMG Group"). Barrow was an attorney at the Fort Worth law firm, Whitaker, Chalk, Swindle and Schwartz, P.L.L.C., and she was the lawyer mainly responsible for drafting the Plan documents. Guardian is an insurance company that was a backer and promoter of the Plan and that issued life insurance policies for some of the participants of the Plan.

On April 30, 2009, the Bonnemas first brought Cross-Claims against Guardian, Barrow, and the Plan Marketers and a Third-Party Action against Whitaker Chalk. The Bonnemas' Fifth Amended Cross-Claim and Third-Party Action sought actual damages of $15 million and treble damages of $45 million. The Bonnemas answered interrogatories verifying these amounts. These Cross-Claims and Third-Party Action were the Bonnemas' claims for affirmative relief. In fact, the Bonnemas, individually, entered into separate 40% contingency fee agreements with Bergman in connection with these claims for affirmative relief. While the parties sued in connection with the Bonnemas' claims for affirmative relief all denied the Bonnemas' allegations, Barrow filed a Cross-Claim against the Bonnemas for contribution and indemnity, and Guardian filed a contingent

Counterclaim against the Bonnemas for its out-of-pocket losses or, alternatively, for the equitable remedy of forfeiture.

The nature of the Bonnemas' claim against Barrow was that they relied on her legal opinions and endorsement of the Plan and that, as a result, the Bonnemas were sued and suffered large financial damages, including the costs associated with attorneys' fees and settlement payments as well as harm to their business reputation.

The Bonnemas were agents of Guardian and sold some, but not all, of the plaintiffs in the Young Litigation, Guardian policies as part of these plaintiffs' participation in the Plan.

The nature of the claims asserted by the Bonnemas against Guardian was that as a backer and sponsor of the Plan, Guardian represented to its agents, the Bonnemas, the nature and qualities of the Plan, and in turn, the Bonnemas made the same representations to the Bonnema consumers (i.e. some of the plaintiffs). These same plaintiffs alleged that such representations were false and sued the Bonnemas, among many other defendants. The Bonnemas claimed that under the Texas Insurance Code, and case law, they possessed an action against Guardian for the damages the Bonnemas suffered, including the losses from the lawsuits as well as damages to their business reputations.

There were a multitude of investor plaintiffs in the Young Litigation. Some plaintiffs sued the Bonnemas. Many other plaintiffs, who purchased their participation in the Plan, had no connection to the Bonnemas. These parties did not sue the Bonnemas. Many of the plaintiffs sued Barrow and/or Guardian. However, not all of the plaintiffs sued Guardian, because some Plan participants bought life insurance policies from other insurance companies. Some plaintiffs that sued Guardian did not sue the Bonnemas. Some sued both. There were some defendants that all plaintiffs

sued. Among them was the Plan.

The nature of Guardian's claims against the Bonnemas was that the Bonnemas breached their fiduciary duty to Guardian by misrepresenting the qualities and features of the Plan from what Guardian had represented to the Bonnemas. In addition to "out of pocket expenses," Guardian sought actual and exemplary damages against the Bonnemas.

Settlement of the Young Litigation as to the Bonnemas

In March 2010, Steadfast reached a settlement with the individual plaintiffs who had claims against the Bonnemas. On March 31, 2010, counsel for Steadfast sent an email to counsel for the Young Plaintiffs and Intervenors and counsel for the Bonnemas, Mr. Bergman and Jay Gray ("Mr. Gray"), attaching the final Settlement and Release, with all signature pages executed, between the Young Plaintiffs and Intervenors and the Bonnemas. This email noted that the settlement funds were delivered to Dalton Harris, counsel for the Young Intervenors, on March 30, 2010. On March 31, 2010, a final and binding settlement was funded and consummated between the Bonnemas and the Young Plaintiffs and Intervenors.

On May 26, 2010, the Young Plaintiffs and Intervenors filed a Motion to Dismiss with Prejudice All Claims Against Archer D. Bonnema, Jacob Bonnema and Joshua Financial Corporation. An Order of Dismissal of the Young Plaintiffs and Intervenors' claims against the Bonnemas was entered by the Court on May 27, 2010.

Steadfast and Bergman and the Settlement and Continued Representation of the Bonnemas

Prior to April 1, 2010, Steadfast communicated with and the Bonnemas/Bergman understood that Steadfast only intended to pay for fees and expenses attributable to defending the Barrow Cross-Claim or Guardian Counterclaim after the main settlement. On February 22, 2010, Steadfast

wrote to Mr. Bergman and Mr. Gray seeking the Bonnemas' consent to the settlement and requesting the Bonnemas to acknowledge that once the settlement was consummated, Steadfast would have no further defense obligation to the Bonnemas. A February 22, 2010 letter to Mr. Bergman and Mr. Gray from Mr. Patrick Kennison stated in pertinent part as follows:

> Steadfast would continue to pay reasonable defense costs incurred on the Bonnemas' behalf until the effective date of the Settlement Agreement on March 12, 2010. However, after March 12, 2010 Steadfast would have no further duty to provide a defense or to pay any defense costs of the Bonnemas' in connection with the Young Lawsuit (Exhibit 52).

Although the Bonnemas consented to the settlement, they maintained that notwithstanding the imminent settlement with the Young Plaintiffs and Intervenors, Steadfast still owed them a duty to defend against the Barrow Cross-Claim and Guardian Counterclaim.

On March 10, 2010, the settlement agreement was reduced to writing. The settlement terms included a release and an indemnity of the Bonnemas by the relevant Young Plaintiffs and Intervenors. These pertinent Young Plaintiffs and Intervenors also agreed to dismiss their claims against the Bonnemas with prejudice. The payment, $2.4 million, was required to be delivered by March 31, 2010, and that the Settlement Agreement and Release was effective on March 31, 2010. By March 28, 2010, all of these pertinent Young Plaintiffs and Intervenors had executed the Settlement Agreement and the funds were delivered to Intervenor's counsel on March 30, 2010. Although the Young Plaintiffs and Intervenors filed their Motion to Dismiss on May 26, 2010 (and the trial court entered an Order of Dismissal on May 27, 2010), all of these pertinent Young Plaintiffs' and Intervenors' claims against the Bonnemas were extinguished by a fully funded and executed settlement, release and indemnity agreement on March 31, 2010.

After April 1, 2010, the Young litigation continued with the Young Plaintiffs and Intervenors

suing other defendants, and the Bonnemas asserting their claims for affirmative relief. While the Young Plaintiffs' and Intervenors' actions against the remaining defendants created significant activity and the Bonnemas' claims for affirmative relief sparked some activity to a lessor degree, the Barrow Cross-Claim and Guardian Counterclaim against the Bonnemas were virtually dormant.

On June 10, 2010, the Young litigation was shut down by the bankruptcy filing by the Plan. Thereafter, other parties to the Young Litigation, including Archer Bonnema, Scott Ridge and Kathy Barrow, filed for bankruptcy. With their claims for affirmative relief stalled as a result of these bankruptcy filings, the Bonnemas undertook steps to have their claims for affirmative relief revived and remanded to the Dallas District Court presiding over the Young Litigation. For example, on July 26, 2011, the Court in Archer Bonnema's bankruptcy held a hearing in which Mr. Bergman and Mr. Gray were appointed as Special Counsel to represent Archer Bonnema on a contingency fee basis in connection with his claims for affirmative relief.

About that same time, in an adversary proceeding, all but one of the Plan Marketers entered into an Agreed Order to Remand the Bonnemas' claims for affirmative relief back to Dallas State Court. Almost immediately upon remand back to Dallas County District Court, Guardian, the Plan Marketers and Whitaker Chalk all filed Motions for Summary Judgment against the Bonnemas' claims for affirmative relief. At the September 26, 2011 hearing, all of the Motions for Summary Judgment against the Bonnemas' claims for affirmative relief were granted. On January 22 and February 4, 2012, the trial court entered Orders of Dismissal of Guardian's Counterclaim against the Bonnemas. Bergman is not seeking any fees from Steadfast after Guardian dismissed its Counterclaim against the Bonnemas.

On the one hand, as of April 1, 2010, through discussions and correspondence, Steadfast was

on notice that the Bonnemas were expecting that Steadfast provide them with a defense against the Barrow Cross-Claim and Guardian Counterclaim. On the other hand, Mr. Bergman and Mr. Gray were aware that Steadfast did not intend to fund the prosecution of the Bonnemas' claims for affirmative relief.

Steadfast and its local counsel, Bob Allen ("Mr. Allen"), and its coverage counsel, Mr. Kennison, stated to Mr. Bergman and Mr. Gray, prior to obtaining the Bonnemas' consent to settle, that they believed that Guardian might voluntarily drop its claim against the Bonnemas as might Barrow. Mr. Bergman and Mr. Gray expressed skepticism to Mr. Allen and Mr. Kennison about either party dropping any claim they had against the Bonnemas. Mr. Allen and Steadfast stated that if Karen Ciotti, Guardian's counsel, would not agree to voluntarily dismiss Guardian's claims, Mr. Allen would prepare a motion for summary judgment for Mr. Bergman and Mr. Gray to file against Guardian and Barrow. This all occurred prior to March 31, 2010.

The Bonnemas/Bergman were aware and on notice prior to March 31, 2010, that after the consummation of the settlement between the Bonnemas and the Young Plaintiffs and Intervenors, Steadfast expected to be billed only for the reasonable and necessary fees and expenses incurred in defending the Bonnemas against the Barrow Cross-Claim and Guardian Counterclaim.

On April 10, 2010, Mr. Gray sent an email to Mr. Kennison and Mr. Allen, advising them that Ms. Ciotti stated that Guardian would not voluntarily drop its claims against the Bonnemas. Mr. Gray's email also reiterated the previous conversations between the Bonnemas' counsel and Steadfast's counsel, on the subject of the continued existence of the Barrow and Guardian claims against the Bonnemas and that the Bonnemas demanded a continued defense.

On May 26, 2010, Mr. Gray sent another email to Mr. Kennison and to Mr. Allen. In this

email Mr. Gray informed Steadfast's counsel that the Plaintiffs filed a Motion to Dismiss. In this email, Mr. Gray stated, that "I have not heard anything from you regarding the Motion for Summary Judgment that Bob was going to file on the Guardian claim. Please advise as to the status."

On June 3, 2010, Mr. Bergman sent an email to Mr. Kennison, Mr. Allen and Maryanne Koller of Steadfast inquiring as to the status of the motion for summary judgment, requesting clarification as to whether Steadfast was denying a defense on the Barrow and Guardian claims, and expressing concern that no one was communicating with Mr. Bergman or Mr. Gray. Mr. Bergman was so perplexed as to the lack of communication that he asked whether something "personally" was wrong with them.

On June 4, 2010, Mr. Kennison responded by email stating that he and Mr. Allen were well and that they would be "in touch" with Mr. Bergman and Mr. Gray "next week." This was the first response from Steadfast since Mr. Gray's April 10, 2010 email and stated nothing regarding the summary judgment or Steadfast's position on the defense of the Barrow and Guardian claims.

On June 8, 2010, at 4:39 p.m., Mr. Allen sent Mr. Bergman and Mr. Gray an email attaching a draft of "Bonnemas' Special Exceptions to Barrows Cross-Claim and Guardian's Counter-Claims" and a draft of "Bonnemas' Motion for Partial Summary Judgment on Barrow's Cross-Claims and Guardian's Counter-Claims." In this email, Mr. Allen requested Mr. Bergman and Mr. Gray's comments.

The next day, June 9, 2010, the Millennium Plan filed for bankruptcy in the Western District of Oklahoma. Once the Bankruptcy was filed, the Bergman Firm could take no action with regard to filing the motions drafted by Mr. Allen, because the Young Litigation was removed to federal court.

A letter dated July 30, 2010, to Mr. Bergman from Zurich stated in pertinent parts:

> This responds to Jay's April 10, 2010 email demand that Steadfast...continue to defend...the Bonnemas...with respect to the counter-claim asserted by [Guardian] and the cross-claim asserted by [Barrow]. The Guardian Counter-Claim and the Barrow Cross-Claim...are the only outstanding claims against the Bonnemas in the Young Lawsuit of which we are aware. If there are others, please advise.
> Steadfast has been providing a defense to the Bonnemas...As you know, Plaintiffs' claims in the Young Lawsuit were settled effective March 31, 2010. You should have received a complete copy of the Compromise Settlement Agreement and Release...in the Young Lawsuit...
> As set forth in Pat Kennison's March 10, 2010 letter, Steadfast agreed to continue to pay reasonable defense costs incurred on the Bonnemas' behalf as to the claims asserted by Plaintiffs in the Young Lawsuit until the Effective Date. Accordingly, after March 31, 2010, Steadfast had no further duty to provide a defense or to pay any defense costs in connection with Plaintiffs' settled claims.
> .....
> ...Steadfast will provide a defense to Joshua and Archer Bonnema for the Barrow Cross-Claim and Guardian Counter-Claim subject to a full reservation of Steadfast's rights...
> Steadfast also expects that any future bills will reflect only work reasonably necessary to defend the Bonnemas against the Barrow Cross-Claim and the Guardian Counter-Claim in the Young Lawsuit.
>
> It is Steadfast's understanding that as the result of the bankruptcy filing by the Millennium Plan...the Young Lawsuit is stayed and administratively closed and that all scheduled trial and hearing dates are cancelled...During the stay, and while the Young Lawsuit is in federal bankruptcy court, Steadfast expects that activity related to the defense of the Barrow Cross-Claim and Guardian Counter-Claim will be very limited if, in fact, there is any activity at all. In the past, your offices have billed on average over 500 hours per month to defend the Bonnemas in the Young Lawsuit. Steadfast has paid your bills without adjustment. As a condition to payment of future bills, Steadfast requests that you provide a detailed itemized budget for anticipated costs through trial and a detailed litigation plan for the defense of the Barrow Cross-Claim and Guardian Counter-Claim. Going forward, Steadfast expects work undertaken to defend the Bonnemas against the Barrow Cross-Claim and Guardian Counter-Claim will be reasonable and consistent with Zurich's billing guidelines, reflecting only those tasks necessary to defend the Bonnemas. Steadfast has no obligation, does not agree to provide, nor will it pay for counsel to assert the Bonnemas' current affirmative claims against other parties in the Young Lawsuit, whether in state court or bankruptcy court (Trial Exhibit 11)

A letter dated August 18, 2010, from Mr. Gray to Ms. Koller states in pertinent part as follows:

> This letter is in response to your letter dated July 30, 2010...With regard to your statement that the settlement with the Young Plaintiffs was effective March 31, 2010, this is not completely accurate. Although the settlement papers may state the settlement is effective as of March 31, 2010, until the claims against the Bonnemas are actually disposed of by the Court, the obligations owed to defend against those claims still exist. So as to your statement that "Accordingly, after March 31, 2010, Steadfast had no further duty to provide a defense or to pay any defense costs in connection with Plaintiffs' settled claims," we disagree.
>
> Although it was made clear to us that Zurich intended to stop paying for the Bonnemas' defense in the litigation after March 31, 2010, at no time did we agree that such action was reasonable. To the contrary, I made it very clear to Zurich's counsel, Pat Kennison and Bob Allen, that if Zurich were to take that position that we would seek all remedies available against Zurich. Our position, on behalf of the Bonnemas, was always that the settlement did not provide closure to the defense of the litigation on behalf of the Bonnemas because of the claims by [Guardian] and [Barrow].
>
> Also, you state that "Steadfast also expects that any future bills will reflect only work reasonably necessary to defend the Bonnemas against the Barrow Cross-Claim and the Guardian Counter-Claim in the Young Lawsuit"...I am unclear as to what Zurich's expectations have to do with Zurich's obligation to its Insureds. It appears from your statements that in order for Zurich to save money you expect us to take little or no action to protect the Bonnemas' interest while the matter is pending in the bankruptcy court. As counsel for the Bonnemas, we will protect our clients by taking whatever steps we believe necessary, as we have done in the past (Trial Exhibit 87).

Not until July 30, 2010, over three-and-a-half months after Mr. Gray's April 10, 2010 email, did Steadfast respond in any way to the substantive issues raised in that email, other than a letter dated June 22, 2010, from John Fox of Steadfast.

The Plan's bankruptcy caused the removal of the Young Litigation to the Bankruptcy Court for the Northern District of Texas, where it would either be remanded back to the state court or sent to the Bankruptcy Court for the Western District of Oklahoma. The filing of the bankruptcy required the attention and work by the Bonnemas' counsel, and they worked to have the case remanded back to state court. This work, among other things, included bankruptcy law research, the preparation of a motion to remand, briefing, attendance at hearings, and communications with counsel.

Bergman Legal Bills After April 1, 2010

On August 28, 2010, the Bergman Firm sent its invoice for April 2010 billing time to Steadfast. Since the beginning of representation, the Bergman Firm consistently lagged approximately three months behind in sending Steadfast the invoices. Steadfast always paid such invoices without complaint to the form, timing, style, content or amount of attorneys' fees charged by the Bergman Firm. Steadfast always paid billings for Mr. Bergman's legal assistant, Rosemary Sanchez, without comment, complaint or question.

Despite receiving the invoice on August 18, 2010, for April 2010 time, Steadfast never raised any questions, nor asserted any objection, or otherwise gave notice to the Bergman Firm regarding that bill or any bills that followed until it filed this lawsuit on March 22, 2011. The invoices for post March 31, 2010 time were similar in form, allegedly "blocked billing" form, and method as those invoices that Mr. Bergman had sent to Steadfast the previous two or more years. Steadfast paid every invoice and never contested the form of those bills.

The fees sought at trial consisted of separate invoices for time expended for April 2010, May 2010, and June 2010. Additionally the Bergman Firm seeks payment of time reflected on Mr. Gray's typed time sheets that was entered at trial as Exhibit 16, as well as for Mr. Bergman's handwritten time sheets, entered at trial as Exhibit 51. Mr. Bergman did not memorialize those time sheets into formal typed invoices because it became apparent by Steadfast's non-payment that such act would be futile.

The total of all fees charged, expended and sought by the Bergman Firm is $353,125.31. These fees were reasonable and necessary and furthered the defense of the Barrow Cross-Claim and the Guardian Counterclaim.

Mr. Bergman did not segregate affirmative claims from defensive ones in his billing, for this reason. Any fees that related solely to the prosecution of the affirmative claims, for example, the defense of the Motions for Summary Judgment and the Bonnema Bankruptcy, were not billed.

The reasonable and necessary fees and expenses incurred by the Bonnemas/Bergman in connection with defending the Barrow Cross-Claim and Guardian Counterclaim was $19,660. It was not necessary to spend the massive amounts of time expended by Bergman in defending the Barrow Cross-Claim and the Guardian Counterclaim. In order to decide what fees were attributable to defending the Barrow Cross-Claim and Guardian Counterclaim, the Court must look at the elements of those claims and analyze what work a lawyer would have to do to defeat those claims.

The work performed by Bergman in the bankruptcy court dealt solely with the Bonnemas' claims for affirmative relief and was not important for furthering the defense of the Bonnemas against the Barrow Cross-Claim or Guardian Counterclaim. After April 1, 2010, there was not any reason for Bergman to review documents of parties who did not sue the Bonnemas or had settled with them. The Court rejects Mr. Bergman's analysis that just being in the lawsuit required the massive effort expended by Bergman as set out in Bergman's post-April 1, 2010 bills.

Mr. Bergman had an honest belief that since the Bonnemas were still being sued, Mr. Bergman had to defend the Bonnemas. Mr. Bergman testified that he believed the $350,000 billed for the work on this case was reasonable and necessary for the defense of the case. Mr. Bergman did not believe that any of the fees billed from April 1, 2010 to January of 2012 needed to be segregated. After March 31, 2010, the case did not slow down. Mr. Bergman felt that the work done on the claims for affirmative relief and the Barrow cross-claim were undistinguishable. Mr. Bergman was informed orally, after the settlement, that Steadfast would only pay for defense related to the two

remaining claims.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and over the subject matter of this action based upon diversity of citizenship. 28 U.S.C. § 1332.

2. The parties have consented in writing to trial of this case before this Court pursuant to 28 U.S.C. § 636.

3. When state law governs the substantive issues in a case, state law also controls both the award and reasonableness of attorney's fees. *Mathis v. Exxon Corp.*, 302 F.3d 448, 461–62 (5th Cir. 2002). Under Texas law—the governing law in this diversity case—attorney's fees or expenses incurred in a lawsuit are not recoverable unless authorized by statute or contract. *Dallas Cent. Appraisal Dist. v. Seven Inv. Co.*, 835 S.W.2d 75, 77 (Tex. 1992). In this case, there was an agreement between the parties to pay attorney's fees.

4. The burden of proof in establishing an award rests on the party seeking attorney's fees. *See El Apple I, LTD. v. Olivas*, 370 S.W.3d 757, 761 (Tex. 2012); *Northwinds Abatement, Inc. v. Emp'rs Ins. of Wausau*, 258 F.3d 345, 353 (5th Cir. 2001).

5. Texas courts accept the lodestar method as a means of calculating reasonable attorney's fees. *See El Apple I, Ltd.*, 370 S.W.3d at 760. The Texas Supreme Court has outlined a two-step process for calculating the lodestar value. *Id.* Courts first determine the reasonable hours spent by counsel on the case and a reasonable hourly rate. *Id.* The number of hours is then multiplied by the hourly rate to arrive at the lodestar, or base fee. *Id.* Once the lodestar value is calculated, the Court may then adjust the amount up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. *Id.* The Texas Disciplinary Rules provide the non-exhaustive list of

factors for consideration:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Id. (citing Tex. Disciplinary R. Prof'l Conduct 1.04(b)); *see also Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818–19 (Tex. 1997). These factors mirror those set out by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th. Cir. 1974). Because *Mathis* mandates the application of state law in this case, this Court performs the analysis described in *El Apple* to determine the reasonableness of the requested fees. *Mathis*, 302 F.3d at 461–62.

6. In calculating the number of hours reasonably spent on the litigation, the moving party must present basic facts: "(1) the nature of the work, (2) who performed the services and their rate, (3) approximately when the services were performed, and (4) the number of hours worked." *El Apple I,* Ltd., 370 S.W.3d at 763. Those hours that are duplicative, excessive, redundant, inadequately documented, or otherwise unnecessary, should be excluded. *Id.* at 762 (citing *Watkins v. Fordice*, 7 F.3d 453, 457 (5th Cir. 1993)). It is important that attorneys document those hours to be billed to their adversary as they would for their own clients. *Id.* at 763.

7. There was an agreement for payment of attorney's fees for the defense of claims against the Bonnemas. The question in this case is what happens after the Bonnemas reach a settlement for

most of the claims against them in March 2010. What is clear is that prior to the March 2010 settlement, Steadfast paid all bills submitted by Bergman. After the settlement was negotiated, it is also clear that Steadfast informed Bergman to stand down for a variety of reasons, which included the mistaken belief that all defensive claims would be resolved by the March 2010 settlement. Verbal discussions occurred wherein Steadfast was informed that there were still two claims pending against the Bonnemas--the Barrow and Guardian disputes. What is also clear is that there were verbal discussions between the parties that Steadfast wanted Bergman to stand down with the litigation expenses other than for the defense of these two remaining claims. Although the Bonnemas only had these two remaining claims pending, the remainder of this massive litigation was still pending and ongoing. In addition, the Bonnemas were still pursing their claims for affirmative relief. What is also clear is that Bergman disagreed with Steadfast's instructions to stand down, and Bergman continued to defend the Bonnemas in the same manner as the firm had been doing since the beginning of the Young litigation. It is also clear that Bergman was engaged in the litigation to the same degree as before, and the Court does not doubt that Bergman spent the approximately $350,000 in dispute in this case. Although there are later letters between the parties arguing about the payment of fees after March 31, 2010, all of these letters are after the fees had been incurred. Unfortunately, there was no written correspondence between the parties prior to the expenditure of the fees. It is also unfortunate that the parties did not seek clarification from each other. We also have the fact that by the time the bill for the $350,000 arrived, three months later, it was too late for the parties to resolve the matter. The Court would note that the sending of the bill three months later was the common practice that the parties had been operating under since the beginning of the Young litigation. Thus, the Court now must resolve whether Bergman is entitled to payment of the

$350,000 of attorney's fees that were generated after the March 31, 2010 settlement and after Steadfast requested that Bergman only spend monies on the defense of the remaining claims against the Bonnemas.

8. "[C]laimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not." *Tony Gullo Motors I L.P. v. Chapa*, 212 S.W.3 299, 311 (Tex. 2006) (citing *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997)); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 10 (Tex. 1991); *Matthews v. Candlewood Builders, Inc.*, 685 S.W.2d 649, 650 (Tex. 1985); *Int'l Sec. Life Ins. Co. v. Finck*, 496 S.W.2d 544, 547 (Tex. 1973)).

9. However, "[a] recognized exception to this duty to segregate arises when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their 'prosecution or defense entails proof or denial of essentially the same facts.' *Flint & Assoc. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624–25 (Tex. App.--Dallas 1987, writ denied). Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are 'interwined to the point of being inseparable,' the party suing for attorney's fees may recover the entire amount covering all claims. *Gill Sav. Ass'n v. Chair King, Inc.*, 783 S.W.2d 674, 680 (Tex. App.--Houston [14th Dist.] 1989), *modified*, 797 S.W.2d 31 (Tex. 1990) (remanded to the trial court for reexamination of attorney's fee award)." *Tony Gullo Motors I*, 212 S.W.3d at 311 (quoting *Stewart Title Guaranty Co.*, 822 S.W.2d at 11-12).

10. "As the only two authorities cited in this passage suggest, this exception had not been recognized by this court before, but only by a few courts of appeals beginning about ten years earlier. In fact, we did not even apply the exception in *Sterling* (as the fees there could be segregated), and

appear to have applied it only once since." *Tony Gullo Motors I*, 212 S.W.3d at 311 (citation omitted). "But the courts of appeals have been flooded with claims that recoverable and unrecoverable fees are inextricably intertwined. As the exception can make all fees recoverable (even if Texas law has long said they are not), it is no surprise that more and more claimants have sought to invoke it. Moreover, as the details of an attorney's work are shrouded in the attorney-client privilege, it may be hard for anyone else to tell whether the work on several claims truly was inextricably intertwined." *Id.* at 312.

11. "The exception has also been hard to apply consistently. The courts of appeals have disagreed about what makes two claims inextricably intertwined—some focusing on the underlying facts, others on the elements that must be proved, and others on some combination of the two. Some do not require testimony that claims are intertwined, while others do. When faced with fraud and breach of contract claims like those here, some have held the claims inextricably intertwined, and others just the opposite." *Id.* As *Sterling* suggests, the need to segregate fees is a question of law. *Id.*

12. The Texas Supreme Court concluded as follows:

> [W]e reaffirm the rule that if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify *Sterling* to that extent.

Id. at 313-314.

13. Bergman asserts that it is entitled to all fees generated because business continued as usual and the firm was required to participate in the entire litigation while their litigation continued. However, Bergman does not cite to any legal authority for the proposition that the Bonnemas' mere presence in the Young litigation on claims that did not predominate or permeate the litigation

justifies their massive fee request. It was not just the Barrow Cross-Claim and Guardian Counterclaim that kept the Bonnemas in the Young litigation after they settled with the Young Plaintiffs and Intervenors. The Bonnemas were asserting claims for affirmative relief against Barrow, Guardian, and several others that they claim were worth millions upon millions of dollars.

14. Under Bergman's argument, every lawyer representing a party in the Young litigation would be required to review every document produced and have every member of a team of three lawyers review all of the correspondence, motions and depositions generated by any party, even if those parties' presence in the suit is totally unrelated to their client's involvement. Under this logic, there is no such concept as a nominal defendant.

15. Texas law requires the Court to first reduce the bills for unreasonable and unnecessary fees and expenses (e.g., fees and expenses for clerical work, for excessive time, for unnecessary duplication of effort, for redundant time, for inadequately documented time and for time otherwise unnecessary). *El Apple I*, 370 S.W.3d at 762. Then, with respect to the remaining fees and expenses, Bergman owed the duty to segregate the recoverable fees and expenses from the non-recoverable fees and expenses. *Tony Gullo Motors I*, 212 S.W.3d at 311.

16. As far as Rosemary Sanchez's fees are concerned, these fees should be eliminated in their entirety because her time is inadequately documented and the evidence shows that they are clerical in nature. With respect to Lindsay Bergman, her fees should be eliminated because Bergman did not meet his burden to show that the fees are reasonable and necessary. The time billed by Lindsay Bergman shows untold hours of excessive, inadequately documented, unnecessary and duplicative work that appears to be that of a legal assistant.

17. The billed fees for Mr. Bergman and Mr. Gray likewise should be significantly reduced as

duplicative, inadequately documented and otherwise unreasonable and unnecessary. There is no reason that Steadfast should be required to pay for the fees charged by Mr. Bergman and Mr. Gray related to work regarding parties who were not suing the Bonnemas; who had settled with the Bonnemas; or whose presence in the Young litigation was unrelated to the Bonnemas. Likewise, once the Young litigation was transferred to the bankruptcy courts, there is no reason to require Steadfast to fund the extensive efforts undertaken by the Bonnemas/Bergman to have the case remanded to the state court.

18. Although the Court disagrees with the position of Bergman that the facts of this case are so interwined to the point of being inseparable, the Court does not see that the firm or Mr. Bergman did anything wrong other than make the decision to continue business as usual without seeking clarification from Steadfast. The fees were expanded. But the agreement between the parties only provided for payment of defense costs related to claims against the Bonnemas. After the settlement in March 2010, there were only two remaining claims against the Bonnemas, and Steadfast was only required to pay for attorney's fees generated for that defense. Although Bergman continued business as usual, that decision was made at Bergman's peril. Although Mr. Bergman felt that he was required to represent his client, requiring him to be involved in the entire litigation, that decision was not reasonable. The Court just does not see that the two remaining defensive claims required Bergman to participate fully in all of the remaining ongoing litigation. Moreover, there was no obligation to pay costs associated with the claims for affirmative relief. Thus, Bergman was required to segregate, which was not done in this case. The Bonnemas/Bergman failed to meet their burden to show that the fees and expenses they are seeking are reasonable and/or necessary.

19. As of April 1, 2010, Steadfast was only required to pay defense costs that were reasonable,

and necessary to defend the Bonnemas against the Barrow Cross-Claim and/or Guardian Counterclaim. Steadfast's duty to defend did not require it to pay the Bonnemas/Bergman fees and expenses attributable to prosecuting the Bonnemas' claims for affirmative relief. The fees and expenses attributable to the prosecution of the Bonnemas' claims for affirmative relief are not recoverable by the Bonnemas/Bergman. The Bonnemas' prosecution of their claims for affirmative relief were unrelated to the defense of the Barrow Cross-Claim or Guardian Counterclaim. The post-April 1, 2010 legal services provided by Bergman did not advance both claims on which fees and expenses were recoverable and claims on which fees and expenses were unrecoverable.

20. Thus, as the Court must exclude most of the requested fees and expenses as duplicative, excessive, redundant, inadequately documented, or otherwise unreasonable and unnecessary or related to their claims for affirmative relief, the Court is left with an amount consistent with the calculations of Steadfast's expert John Owen. Based upon his testimony, the Court can take the additional step of apportioning the remaining fees between those fees incurred exclusively for defending the Barrow Cross-Claim and Guardian Counterclaim and award one hundred percent of those fees and expenses, from those fees incurred with both the defensive and affirmative claims. Mr. Owen testified that the fees and expenses attributable to defending the Bonnemas against the Barrow Cross-Claim and Guardian Counterclaim totals $19,660. Bergman does not make any attempt to make this determination and the Court will rely upon the opinion of Mr. Owen. Otherwise, there would be no way for the Court to make this determination based upon this record.

21. In light of the March 31, 2010 settlement between the Bonnemas and the Young Plaintiffs and Intervenors, the vast majority of the sought-after fees and expenses were not reasonable, necessary, or related to defending the Bonnemas against the Barrow Cross-Claim and/or Guardian

Counterclaim. The Court rejects Bergman's claim for $350,000 in fees and expenses and limits the recovery of the fees and expenses that are the subject of this suit to $19,660.

22. The Court thus enters a declaratory judgment that Steadfast pay defense expenses to the Bonnemas/Bergman in the amount of $19,660.

SIGNED this 26th day of July, 2013.

AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE