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ATTORNEYS FEES IN INSURANCE LITIGATION: WHAT WORKS AND WHAT DOESN'T

Robert D. Allen

Author Contact Information:
Robert D. Allen
The Allen Law Group
Dallas, TX

bob.allen@theallenlaw.com
214.217.5012

Parties litigating insurance coverage and bad faith disputes often must factor in the possibility that attorneys fees may be awarded to one side or the other. Fundamentally, attorneys fees can only be awarded if allowed by statute, rule or by a contract between the parties. Since most insurance policies do not include attorneys fees provisions, statutes are the main source for recovering attorneys fees in Texas insurance coverage and bad faith litigation. The most common statutes for recovering attorneys fees in Texas insurance coverage and bad faith litigation are Tex. Civ. Prac. & Rem. Code §37.001 (for breach of contract); Tex. Civ. Prac. & Rem. Code §38.009 (for state court declaratory judgment actions); Tex. Ins. Code §541.152 (for unfair claims handling practices); and Tex. Ins. Code §542.541 (for breaches of the prompt payment of claims statute). Rules that can give rise to awards of attorneys fees in coverage and bad faith litigation include: Tex. R. Civ. P. 91a (for actions not based in law or in fact); and Fed. R. Civ. P. 37(b)(2)(C) (for federal court discovery sanctions).

The courts are currently churning out opinions on awarding attorneys fees. Beginning in earnest with *Arthur Andersen & Co. v. Perry Equip. Corp.,* 945 S.W. 2d 812 (Tex. 1997), the Texas Supreme Court has regularly weighed in on the standards for awarding attorneys fees, leading to significant progeny in the Texas appellate courts. Also, the Texas federal district court Memorandum Orders on attorneys fees are frequently reported on Westlaw and LEXIS, providing a wealth of caselaw and analysis.

I. Standards for Recovering Attorneys' Fees: *Perry Equipment*

The reasonableness of attorneys fees is generally a fact issue. *See Garcia v. Gomez,* 319 S.W.3d 638, 642 (Tex. 2010). Appellate courts review attorney's fee awards for an abuse of discretion. *Ridge Oil Co. v. Guinn Invs., Inc.,* 148 S.W.3d 143, 163 (Tex. 2004). The basic way to calculate an attorneys fees award is the lodestar method. This method begins by multiplying the number of hours worked by a reasonable hourly rate to obtain a lodestar. The lodestar can be adjusted upward or downward depending on the *Perry Equipment* Factors:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly;
- The likelihood … that the acceptance of the particular employment will preclude other employment by the lawyer;
- The fee customarily charged in the locality for similar legal services;
- The amount involved and the results obtained;
- The time limitations imposed by the client or by the circumstances;
- The nature and length of the professional relationship with the client;

- The experience, reputation and ability of the lawyer or lawyers performing the services; and

- Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered

Arthur Anderson & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997).

Texas Federal Courts will sometimes utilize the *Perry Equipment* factors and will sometimes utilize what are called the *Johnson* Factors as articulated in *Johnson v. Ga. Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* Factors are basically the same as the *Perry Equipment* Factors; although one *Johnson* Factor not included in the *Perry Equipment* Factors is fee awards in similar cases. *See generally Mid-Continent Cas. Co. v. Chevron Pipe Line Co.,* 205 F.3d 222, 232 (5th Cir. 2000) ("Because Texas courts engage in a similar analysis, it has *not* been necessary for our court to decide whether the *Johnson* factors control in Texas diversity cases").

While the lodestar method is a very common way to recover fees in insurance coverage and bad faith litigation, law exists that a plaintiff seeking to recover for breach of contract or deceptive practices in an insurance case is not limited to the lodestar method. *See United Nat. Ins. Co. v. AMJ Investments,* 447 S.W.3d 1, 13, 16 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) ("a plaintiff seeking to recover for breach of contract or deceptive practices in an insurance case is not subject to the [lodestar] requirement," … [h]aving chosen that method, AMJ was required to introduce sufficient evidence to allow the factfinder to apply it.").

II. Standard for Segregating Attorneys' Fees

Although not an insurance case, in 2006 the Texas Supreme Court analyzed how parties should allocate fees attributable to causes of action permitting the recovery of attorneys' fees (e.g. breach of contract) from the fees attributable to causes of action that do not allow for a prevailing party to recover their fees (e.g. negligence). *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). In *Chapa*, the Texas Supreme Court held that when a party incurs attorney's fees relating solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. *Id*. at 313. Intertwined facts do not convert unrecoverable fees to recoverable. *Id*. at 313-14. In other words, just because recoverable and unrecoverable claims depend upon the same set of facts or circumstances, that does not mean those claims require the same research, discovery, proof, or legal expertise. *Id*. at 313.

Therefore, the Court overruled the previous rule in *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1 (Tex. 1991), stating that *Sterling* went too far in suggesting that a common set of underlying facts necessarily made all claims arising therefrom "inseparable" and all legal fees recoverable. *Id*. Here, the Texas Supreme Court held that 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. "But when, as here, it cannot be denied that at least some of

the attorneys' fees are attributable to claims for which fees are not recoverable, segregation of fees ought to be required and the jury ought to decide the rest."

III. Standards for Recording the Rendering of Legal Services

Six years after *Chapa*, the Texas Supreme Court analyzed the sufficiency of the evidence required to support an attorneys fees award in *El Apple I, Ltd. v. Olivas,* 370 S.W.3d 757 (Tex. 2012). Here, the Texas Supreme Court found that generalities about tasks performed were insufficient to determine reasonable and necessary fees under the lodestar method. *Id.* at 763. Sufficient evidence includes evidence "of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id.* at 764.

Because the attorneys fees evidence in *El Apple* was limited to the number of hours worked and generalities about discovery and the length of trial, the Texas Supreme Court remanded the case to determine reasonable and necessary attorneys fees. In so doing, the Texas Supreme Court noted that if contemporaneous records are not available, the attorneys must reconstruct their time with information to allow a meaningful review of the fee request. *Id.; see also City of Laredo v. Montano,* 414 S.W.3d 731, 736-37 (Tex. 2013) (case remanded to determine fees when attorney did not provide evidence of the time devoted to specific tasks); and *Long v. Griffin,* 442 S.W.3d 253, 255-56 (Tex. 2014) (general evidence regarding amount of time, hourly rates, that the case involved extensive discovery, several pretrial hearings, multiple summary judgment motions and a four and one-half day trial held: not sufficient to support an attorneys fees award); *United Nat. Ins. Co. v. AMJ Investments, LLC,* 447 S.W.3d 1, 17-18 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (remanding case for a redetermination of attorneys fees because fee proponent "failed to introduce evidence that was sufficiently specific to permit the determination of a reasonable fee for its attorney's necessary services").

IV. Recovering Attorneys in Texas Courts: What Works

Here are some recent examples of successful attorneys fees applications in interesting situations.

A. Dallas Court of Appeals Affirms a Fee 5.5 Times over the Lodestar

A case that supports the recovery of a substantial fee is *J.C. Penney Co., Inc. v. Ozenne,* 453 S.W.3d 509 (Tex. App.—Dallas 2014, pet. denied). *Ozenne* involved a situation where the Dallas Court of Appeals analyzed a $3.1 million fee request when the lodestar amount was approximately $550,000. The attorneys fee statute involved in *Ozenne* was the Tex. Bus. Org. Code §21.561, which provides that a trial court "may" award fees if the proceeding substantially benefits the corporation. Thus like the Texas Declaratory Judgment statute, Tex. Civ. Prac. & Rem. Code §38.009, an attorney fees award is not mandatory and it is left to the discretion of the trial court.

The key factor in *Ozenne* was a Stipulation that allowed the court to determine fees based on "the results achieved … and the risks of undertaking the prosecution of the Action on a contingent basis." *Id.* at 512. Thus, the court was not constrained by the lodestar and *Perry Equipment* Factors, which would have resulted in a significantly lower fee.

B. Houston 14th Court of Appeals Affirms $85,000 Fee on a $17,000 Jury Award

State Farm Lloyds v. Hanson, ___ S.W.3d ___, 2016 WL 3575069 (Tex. App.—Houston [14th Dist.] 2016 pet. filed) involves a first party breach of contract action for a hail-damaged roof claim. At first, State Farm denied coverage on the claim and then post-suit, it made a $30,000 settlement offer.

The Plaintiff prevailed on her breach of contract action and was awarded approximately $17,000 in damages for wrongfully denied policy benefits. With respect to Plaintiff's request for fees, she introduced a ten-page Summary with information about the date, the time keeper, tasks performed, hours worked and hourly rate. Along with supporting testimony by the Plaintiff's attorney, the Plaintiff proved up approximately $157,000 in fees and volunteered a 5% reduction for fees exclusively relating to an unsuccessful bad faith claim. Accordingly, the Plaintiff asked the jury to award right at $150,000 for attorneys fees. State Farm's expert countered with a fee range between $30,000 and $40,000. The jury awarded $15,000 in fees from the start to the rejection of the Plaintiff's settlement offer and $70,000 in fees from the settlement rejection through trial (and another $80,000 in conditional appellate attorneys fees).

Upon a comprehensive attack of the attorneys fees award on appeal, the Houston 14th Court of Appeals affirmed the trial court judgment. Here is what worked:

- Plaintiff's counsel presented expert testimony regarding the reasonableness and necessity of the work, experience and quality of the lawyers and their prevailing hourly rates. *Id.* at 11.

- Plaintiff introduced a ten page computer generated summary that included general and block-billing entries. *Id.* at 11-12.

1) Block Billing

In response to the Block Billing attack, the 14th Court of Appeals held that the Summary allowed for "meaningful review" "because they included details about the nature of the work, who did it at what rate, what day the work was performed, and the time worked. [citation omitted] … [T]he entries were detailed enough to provide 'some indication of the time spent on various parts of the case.'" *Id.* at 12.

2) General Time Entries

Plaintiff Hanson also withstood an attack on the fees evidence that the time entries were too general. Here, the 14th court relied on the testimony of the plaintiff's attorney about the grueling nature of litigating jury trials. Also, the court specifically found the description: "Prepare for trial" was legally sufficient. *Id.* at 13; *citing Med. Disc. Pharmacy, L.P. v. State,* No. 01-13-00963-CV, 2015 WL 4100483 (Tex. App.—Houston [1st Dist.] 2015, pet ___) (concluding that *El Apple* does not require more level of detail for particular category of tasks than, e.g., "attend/appear at hearing").

3) Failure to Segregate

With respect to an attack on the fees evidence because the recoverable fees were not properly segregated from the non-recoverable fees, the 14th Court of Appeals held:

> even when fee segregation is required, attorneys are not required to keep separate records documenting the exact amount of time prosecuting one claim versus another. Rather, segregation is sufficiently established if an attorney testifies that a given percentage of the time worked would have been necessary even if the claim for which attorney's fees are unrecoverable had not been asserted. [Citations omitted].

Id. at 14.

Accordingly, the 14th Court of Appeals relied on the Plaintiff's attorneys testimony that: a) the case involved inextricably intertwined claims; b) much of the discovery for Hanson's contract claim applied to her bad faith claims; c) an estimated five percent of the attorney's time shown on the summary was spent solely on bad faith issues; and d) the Plaintiff's attorney did not include every fee incurred in the course of the trial, particularly for the trial days themselves. *See Sentinel Integrity Sols., Inc. v. Mistras Group, Inc.,* 414 S.W.3d 911, 929-30 (Tex. App.—Houston [1st Dist.] 2013 pet. denied) (considering as part of segregation analysis testimony that bills did not include every fee incurred).

4) Excessive Fee Award

In response to the argument that the jury's fee award was excessive, the 14th Court of Appeals deferred to the jury. For example, the jury had to consider *Perry Equipment* Factor "the amount involved and the results obtained." Also, the 14th Court of Appeals noted that the fees awarded by the jury were less than half sought by Plaintiff Hanson. For supporting authority, the 14th Court of Appeals cited to *Bencon Mgmt. & Gen. Contracting, Inc. v. Boyer, Inc.,* 178 S.W.3d 198, 209-10 (Tex. App.—Houston [14th Dist.] no pet.) (fee award of over $282,000 compared to actual damages of $81,336.83 was not factually insufficient) and *Metroplex Mailing Services, LLC v. RR Donnelley & Sons Co.,* 410 S.W.3d 889, 900 (Tex. App.—Dallas 2013 no pet.) ("[T]here is no rule that fees cannot be more than the actual damages awarded.").

C. $3.2 Million Fee Award: Innovated Segregation

In *Bear Ranch, LLC v. Heartbrand Beef, Inc.,* 2016 WL 3549483 (S.D. Tex. 2016), Judge Gregg Costa reconsidered an application of a $5 million fee upon undergoing a court ordered exercise of segregating fees relating solely to a non-recoverable fraud claim from the recoverable fees attributable to enforcing the agreement between the parties. Specifically, Judge Costas charged the prevailing party with submitting a fee request that: "(1) eliminated those fees related solely to the damages on the nonrecoverable fraud claims" … and 2) proposed a percentage of the remaining fees that would have been recovered absent the unrecoverable claims."

After agreeing that approximately $600,000 in fees and expenses were specifically attributable to the fraud claim that did not support the recovery of fees, here is what worked for the recovery of a substantial fee.

1) Segregation by Trial Phases

The fee claimant proposed and Judge Costas accepted dividing the litigation into three phases for pre-summary judgment; summary judgment through jury verdict and post-trial. *Citing Eagle Suspensions, Inc. v. Hellman Worldwide Logistics, Inc.,* 2015 WL 252442 at *3-*4 (N.D. Tex. 2015) (dividing case into six phases to determine the "percentage of fees that should be excluded at each stage for work relating solely to claims other than the [recoverable claim]").

- Phase 1 (pre-summary judgment) Judge Costas allocates 80% of $2,623,942.40 in fees and expenses (right at $2.1 million) toward claims that support the recovery of fees. Judge Costas concedes that most of the discovery would have been needed even absent the unrecoverable fraud claims or the unsuccessful contract claim. Judge Costas based this calculation in part on his "familiarity with this complex litigation." *Id.* at *2.

- Phase 2 (summary judgment through jury verdict) Judge Costas accepts the 76% proposed by counsel seeking the recovery of fees. 76% was derived from using trial time as a barometer. Here, the trial time attributable to claims supporting the recovery of fees was calculated at 804 minutes out of 1,057 minutes of total trial time; or 76%. "The Court agrees that trial time is an accurate measure of what amount of fees were recoverable; in fact, minute-by-minute allocation is an even more refined measure than the witness-by-witness allocation the Court suggested." *Id.* Accordingly, Judge Costas awarded approximately $780,000 out of $1.025 million in fees and expenses incurred during this phase.

- Phase 3 (post-trial) Judge Costas accepts the 44% proposed by counsel seeking the recovery of fees. This 44% figure was based on the percentage of the post-trial briefing attributable to claims supporting the recovery of fees. Apparently, there were 304 pages of filed post trial briefing and 133 pages or 44% were attributable to recoverable claims. Judge Costas ruled that "[t]his point of

reference reasonably reflects the amount of work post-trial that was expended on recoverable claims." *Id.* at *3. Accordingly, Judge Costas awarded approximately $380,000 of the approximately $865,000 of fees and expenses incurred during this phase.

2) Amount in Controversy/Complexity of Case

After employing this segregation calculus, Judge Costas next evaluated the reasonableness of the remaining $3.2 million in fees. In this regard, Judge Costas acknowledged that the "[r]equested fees must bear a reasonable relationship to the amount in controversy or to the complexity of the case." *Northwinds Abatement, Inc. v. Emp'rs Ins. of Wausau,* 258 F.3d 345, 354 (5th Cir. 2001) ("[T]he most critical factor in determining an award of fees is the 'degree of success' obtained by the victorious plaintiffs."). Even so, there are instances of attorneys fees awards being held as reasonable "even when the amount of attorneys' fees far surpasses the amount of actual damages." *Id. citing Chaparral Texas, L.P. v. W. Dale Morris, Inc.,* 2009 WL 455282 at *13-*15 (S.D. Tex. 2009) (collecting Texas cases demonstrating that the complexity of litigation can justify a higher fees award even when the amount recovered was minimal in comparison).

"Although HeartBrand may not have achieved a significant financial recovery in the judgment, the equitable relief it obtained has significant economic value." *Bear Ranch,* 2016 WL 3549483 at *4. "[E]ven if HeartBrand's successes were disproportionate to the fees and costs award, 'disproportion alone does not render the award of attorneys' fees excessive.'" *Citing Northwinds Abatement, Inc.* 258 F.3d at 355 (affirming $712,000 in attorneys' fees on recovery of $74,570 in actual damages).

3) Block Billing

In response to an attack on the fees being block-billed, Judge Costas found that "there is more than sufficient detail to determine whether the hours were reasonably expended." *Citing OneBeacon Ins. Co. v. T. Wade Welch & Assc.,* 2015 WL 5021954 at *8 (S.D. Tex. 2015) ("The court is unconcerned with the block billing, given the level of detail on the bills."). *Bear Ranch,* 2016 WL 3549483 at *4 n.5.

4) Hourly Rates

Analyzing the sought-after hourly rates, Judge Costas considered the relevant community to be the Southern District of Texas. In this regard, Judge Costas found hourly rates for partners between $606 and $684 and for associates between $400 and $492 were consistent with the prevailing market rates for attorneys in the Southern District of Texas who handle complex litigation." Judge Costas also found that these rates found support from the State Bar Survey and because the opposing counsel's hourly rates were even higher than the rates sought in the fee application. *Id.* at 5.

V. Recovering Attorneys Fees in Texas Courts: What Doesn't Work

There is no shortage of unsuccessful fee applications as well. A couple of representative examples include:

A. Fifth Circuit Finds $530,000 Attorneys Fee Award in a Simple Coverage Case Excessive.

In *Mid-Continent v. Chevron Pipe Line Co.,* 205 F.3d 222, 232 (5th Cir. 2000), the Fifth Circuit held that in reviewing a fee award, "it must also consider, *inter alia,* 'whether the award is excessive in light of the plaintiff's overall level of success'" and that "the requested fees must bear a 'reasonable relationship to the amount in controversy or to the complexity' of the circumstances of the case." *Id.* "In deciding whether fees are excessive, we '[are] entitled to look at the entire record and to view the testimony, the amount in controversy, the nature of the case and our common knowledge and experience as lawyers and judges.'" *Id.*

The Fifth Circuit noted that "many of Mid-Continent's complaints appear legitimate, including, for example those about billing record entries regarding clerical work performed by paralegals." *Id.* at 234. The Fifth Circuit concluded that the fee award was excessive and unreasonable. "In sum, the amount of the award was an abuse of discretion." *Id.* The Fifth Circuit's parting advice to the district court was: "[n]eedless to say, on remand, 'the court should exclude *all* time [in the billing records] that is excessive, duplicative, or inadequately documented.'" *Id.*

B. Texarkana Court of Appeals Holds that Awarding Fees under the Declaratory Judgment Act in a Standard UM/UIM Claim is not Equitable or Just

Allstate Ins. Co. v. Jordan, No. 06-15-00042 (Tex. App.—Texarkana 2016) involved an Underinsured Motorists Coverage case where a UIM claimant filed a declaratory judgment actions to resolve the damages phase of the UIM claim and recovered attorneys fees pursuant to Tex. Civ. Prac. & Rem. Code §38.009 . On the one hand, the Texarkana Court of Appeals held that use of the Texas Uniform Declaratory Judgment Act was appropriate. On the other hand, the court held that:

> allowing recovery of attorneys fees in UIM cases under [Tex. Civ. Prac. & Rem. Code §38.009] would create a special category of contract cases where attorneys fees would be recoverable prior to presentment. The Supreme Court has made it clear that a [Uniform Declaratory Judgment Act] claim cannot be used "as a vehicle to obtain otherwise impermissible attorney's fees.

Id. at 10. Accordingly, the Texarkana Court of Appeals modified the judgment to delete the award of attorneys fees.

C. Houston 14th Court of Appeals Refuses Insured's Attempt for a Double Recovery Based on Multiple Insurers Owing Duties to Defend.

In *Coreslab Structures (Texas), Inc. v. Scottsdale Ins. Co.,* ___ S.W.3d ___, 2016 WL 4060256 (Tex. App.—Houston [14th Dist.] 2016), the policyholder, Coreslab, incurred approximately $883,000 in defense costs through the settlement of two property damage cases. Almost all of these defense costs, approximately $825,000, were paid by one of the Coreslab's insurers, Lexington. A coverage dispute involving Coreslab's status under the Scottsdale policy resulted in a declaration that Coreslab was an additional insured and that Scottsdale owed Coreslab a duty to defend. The Summary Judgment evidence showed that Scottsdale paid at least $410,000 toward the defense of Coreslab. As stated by the 14th Court of Appeals, "Coreslab essentially asserts that it is entitled to recover $473,400.39 against Scottsdale based on defense costs that Scottsdale failed to pay under the Scottsdale policy, even though Coreslab has not paid any of the attorneys fees and even though Lexington has paid $825,642.32 to Coreslab's defense counselin the Underlying Lawsuits." *Id.* at *4.

Rejecting Coreslab's arguments that since Scottsdale owed it a "complete defense," and that because Scottsdale not paying for the entire defense had a negative impact on Coreslab's loss history, the 14th Court of Appeals held that "[a]s a matter of law, Coreslab is not entitled to recover any damages based on Coreslab's defense costs in the Underlying Lawsuits because the total amount paid by Lexington and Scottsdale exceeds the sum of Coreslab's defense costs in the Underlying Lawsuits." *Id.* at *5.

D. Dallas Federal Judge Halves $1.2 Million Fee Request

Spear Marketing, Inc. v. Bancorpsouth Bank, 2016 WL 193586 (N.D. Tex. 2016) involved a fee application totaling approximately $1.2 million. Judge Jane Boyle held that upon calculating the lodestar amount (number of hours an attorney reasonably spent on the case multiplied by an appropriate hourly rate based on the market rate in the community for this work), "the court should exclude all time that is excessive, duplicative, or inadequately documented." *Id.* at *8. Reducing partner hourly billing rates, which exceeded $600 and associate hourly rates in excess of $400, the court found that attorneys of comparable skill, experience and reputation to range from $100 to $400 an hour and between $60 and $125 an hour for legal assistants. *Id.* at *9. After noting that: "[g]enerally, fee awards for rates above $500 per hour are reserved for 'specialized tasks in complex cases that few attorneys are capable of handling,'" Judge Boyle held that "the Court will adhere to a general rate of $150 to $400 per hour for attorneys and $100 an hour for paralegals." *Id.* at *9-*10.

On the one hand, Judge Boyle found that the time spent on the requested fees was reasonable and it was not excessive, duplicative, inadequately documented or inadequately segregated. On the other hand, Judge Boyle recalculated the lodestar amount using the lower hourly rates to obtain an approximately 50% reduction from the sought after fees. *Id.* at *9, *11.

E. Dallas Judge Rules Insurer Owes No Obligation to Pay Fees or Expenses Associated with Insured's Claims for Affirmative Relief

In *Aldous v. Darwin National Assurance Co.,* 92 F.Supp. 2d 555 (N.D. Tex. 2015), Judge Sam Lindsay considered the coverage issues emanating from the insured lawyer's suit for fees and the clients' counterclaim for malpractice. Here, Judge Lindsay rejected the insured's argument that her affirmative claims for unpaid fees were inextricably intertwined with the malpractice counterclaims. Accordingly, the insured had the obligation to segregate the attorneys fees attributable to the claims for affirmative relief from the attorneys fees attributable to the defense of the malpractice counterclaim. *Id.* at 563. *See also Landmark Am. Ins. Co, v. Ray,* 2006 WL 4092436 (W.D. Tex. 2006) (rejecting insured's argument that its counterclaim for affirmative relief was inextricably intertwined with defense of claim and creating three categories: 1) fees attributable solely to defense of plaintiff's claim; 2) fees attributable solely to prosecuting plaintiff's counterclaim for affirmative relief; and 3) fees attributable to both the defense of the insured against the plaintiff's claims and the insured's prosecution of her claims for affirmative relief).

Also, Judge Lindsay applied judicial estoppel to prevent the insured from representing that the defense costs were $668,068.31 in a previous action and then seeking more in defense fees in the suit against the insurer. *Aldous,* 92 F.Supp. 2d at 565-69. Additionally, Judge Lindsay rejected the insured's argument that the insurer's insistence on the insured following the insurer's guidelines was a breach of the policy (including not paying for secretarial overtime and weekend air conditioning). *Id.* at 571-72. Furthermore, Judge Lindsay found that the insurer's claim against the insured for moneys had and received was meritorious to the extent that the insurer overpaid its share of the defense costs. *Id.* at 578-79.

VI. Selected Issues

A. Trial over Fees to Judge or Jury

Whether to try attorneys fees to the court or to the jury is a judgment call that depends on the circumstances. If a party has multiple timekeepers seeking a large fee, then it might be tempting to opposing counsel to bring this information to the attention of the jury. Conversely, particularly if the fee application is reasonable, trying fees to the jury allows counsel to testify in front of the jury about what he or she did to prepare for and try the case. This gives counsel the opportunity in the middle of the trial to personalize him or herself and perhaps the client as well.

B. Declaratory Judgments

With respect to the recovery of attorneys fees, Declaratory Judgment Actions are different from breach of contract and the insurance code fees statutes. Tex. Civ. Prac. & Rem. Code §37.009 provides: "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." According to the Texas

Supreme Court, "the [Uniform Declaratory Judgment Act] entrusts attorney fees awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law." *Bocquet v. Herring,* 972 S.W.2d 19, 20 (Tex. 1998). Accordingly, fees awarded under the Declaratory Judgment act are discretionary; giving rise to arguments for and against whether the sought after fees are equitable and just.

Also, it is possible in state court cases for the court to award fees to insurers in pure Declaratory Actions (such as when the insurer is defending under a reservation of rights and seeks a declaration of no duty to defend). Texas federal courts, however, do not award fees in pure declaratory judgement actions. *See Utica Lloyds of Texas v. Mitchell,* 138 F.3d 208, 210 (5th Cir. 1998).

Furthermore, fees will not be awarded under the Texas Uniform Declaratory Judgment Act when they would not otherwise available. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.,* 292 S.W.3d 660, 669 (Tex. 2009). So, if an insured sues for a breach of contract; the insurer's counterclaim for a declaratory judgment will not support a fee award. Since the insurer cannot recover fees in defending a breach of contract action, that insurer cannot use the Texas Uniform Declaratory Judgment Act as an avenue to recover otherwise nonrecoverable fees.

C. Appellate Counsel Fees

Appellate counsel fees can come into play as appellate counsel attending trial and also for contingent fees in the event of an appeal. Depending on the circumstances, it may be possible to argue that appellate counsel participating at trial is not necessary. Also, there is authority for the proposition that courts should not conditionally award attorneys fees for appeals (rather, they should be addressed on a remand to the court, if necessary). *See, e.g., Great American Ins. Co. v. AFS/IBEX Financial Services, Inc.,* 2009 WL 361956 (N.D. Tex. 2009). If conditional attorneys fees evidence is allowed, it is important for the fee proponent to show a rational basis between the fees sought and the work involved. Conversely, fee opponents should attack the lack of a rational basis, if merited under the circumstances.

D. Contingency Fees

Contingency fees give rise to a host of issues in the recovery of fees in insurance coverage and bad faith litigation. While there is no blanket rule against them, the cases strain to reconcile contingency fees with the *Perry Equipment* Factors. *See OneBeacon Ins. Co. v. T. Wade Welch & Assc.,* 2015 WL 5021954 (S.D. Tex. 2015). An example of a contingency fee being awarded under Tex. Civ. Prac. & Rem. Code §38.001 for breach of an insurance contract is *Mid-Continent Cas. Co. v. Kipp Flores Architects, L.L.C.,* 602 Fed. Appx. 985 (5th Cir. 2015), which in awarding fees pursuant to a contingency fee agreement minus a reduction for time spent outside of the breach of insurance contract claim, the Fifth Circuit held:

> Mid-Continent argues that Texas requires lodestar evidence for attorneys fees. That is not accurate. Texas courts permit otherwise reasonable contingency fee awards under §38.001.
>
> ***
>
> Mid-Continent's argument rests entirely on the proposition that KFA failed to submit lodestar evidence. Because Texas law does not require lodestar evidence for contingency fee arrangements and because Mid-Continent has not shown that the fee is unreasonable, we cannot say that the district court abused its discretion in awarding the fee.

Id. at 999-1000.

VII. Tips for Effective Fee Applications

- **Better the task description, the easier the bill is to uphold**
- **Demonstrate proper and efficient staffing (explain each team member's role)**
- **Demonstrate that work performed was not duplicative, unnecessary or excessive (avoid obvious overbilling situations)**
- **Block Billing Beware**
- **Show reasonable segregation between recoverable fees from nonrecoverable fees**
- **Show that the hourly rates are in line with the particular market**
- **Demonstrate that fees for clerical tasks are not being sought**
- **Allow for some Business Judgment reductions**
- **Consider Expert Testimony**
- **Remember Pigs get Fatter; while Hogs get Slaughtered**

VIII. Areas Conducive to Challenge

- **High hourly rates; especially in routine matters**
- **Improper delegation of work**
- **Redundancy and unnecessary duplication of effort**
- **Excessive time keepers**
- **Excessive time spent on particular tasks**
- **Apparent bill padding**

- **Overly redacted time entries**
- **Claims that fees attributable to both recoverable and nonrecoverable claims are inextricably intertwined**
- **Inadequate segregation efforts**
- **Legal Assistants (and Associates) performing clerical work**
- **General and vague time entries**
- **Block-billing**
- **Billing for traditional overhead expenses**
- **Remember, be careful what you ask for; you might just get it.**