

Recovering Attorney’s Fees: Changes to Chapter 38

BY ALEX GEBERT AND KAYLA SHERRILL

Under Texas law, recovery of attorney’s fees must be permitted by contract or statute. For a breach of contract, Chapter 38 of the Texas Civil Practice & Remedies Code provides a method for recovery if the contract did not specifically permit recovery of attorney’s fees. Portions of Chapter 38 had previously been interpreted to preclude recovery of attorney’s fees from LLCs or Partnerships, and potentially render a defendant liable and uncovered for an award of attorney’s fees against them in breach of construction contract cases.

To address these issues, the 87th Texas Legislature passed two bills clarifying and refining the boundaries of Chapter 38. The first bill, HB1578, took effect on September 1, 2021, and now allows parties to recover attorney’s fees regardless of the type of business entity the defendant is. HB1578 applies to lawsuits filed on or after the date when the bill took effect. The second bill, HB2416, also taking effect at the same time, added recovery of attorney’s fees as compensatory damages for the breach of a construction contract.

HB1578 fixed language in Section 38.001 of the CPRC on what types of business entities plaintiffs could recover attorney’s fees from. HB1578’s passage came after its first three unsuccessful attempts to make it through the legislature. Prior versions of Section 38.001 only provided for the recovery of attorney’s fees against individuals and corporations, leaving a subset of entities that were not a corporation or an individual potentially unaccounted for. The legislature acknowledged this and integrated the Texas Business Organization Code Section 1.002’s definition of an “organization,” into CPRC Section 38.001, in place of where Section 38.001 previously had “corporation.”

This change increased the reach of Section 38.001, which now includes corporations, limited or general partnerships, LLCs, business trusts, REITs, joint ventures, joint-stock companies, cooperatives, associations, banks, insurance companies, credit unions, savings and loan associations, or other organizations, regardless of whether the organization is for-profit, nonprofit, domestic, or foreign. However, this new amendment excludes the recovery of attorney’s fees sought against quasi-governmental entities, religious organizations, charitable organizations, or charitable trusts. Even with those limitations, this welcomed change closed the door on any gamesmanship to avoid recovery of attorney’s fees against a party who is neither a corporation nor an individual.

HB2416 added Section 38.0015, a new provision to Chapter 38 of the CPRC. This included classifying the recovery of attorney’s fees as compensatory damages for the breach of a construction contract. With this change, insurance companies became responsible for paying the prevailing party’s attorney’s fees rather than

a prior Texas Supreme Court Ruling (*In re Nalle*) which was believed to leave contractors potentially liable for possible large awards of attorney’s fees themselves, including in the event a claim was not covered by insurance.

HB2416, and the addition of Section 38.0015 to the CPRC that it produced, now places insurance carriers responsible for paying the attorney’s fees of a prevailing party, in connection with covered claims. Adding 38.0015 should underscore those contractors who do not prevail in lawsuits on covered claims to be aware of any court’s final ruling to ensure the insurance carrier and not the contractor is responsible for attorney’s fees awarded to the prevailing party.

The new section 38.0015 poses unique consequences for the construction industry, including general contractors, design professionals, and owners. Because construction cases can involve many parties, cross- and counterclaims, and different causes of action, the parties should pay special consideration to the issue of recovering attorney’s fees under Chapter

38. In particular, the breach of a construction contract can now result in the recovery of attorney’s fees as compensatory damages.

These changes and all future evolutions of Chapter 38 will affect contract drafting, negotiations, and alternate dispute resolution strategies moving forward. While the benefit of these changes to Chapter 38 may only seem to apply to claimants and plaintiffs, all contracting parties should be mindful of these changes as they could find themselves defending a lawsuit and the appropriateness of recovering attorney’s fees under Chapter 38. All parties should consider handling the question of attorney’s fees upfront via contractual provision. By clarifying, refining, limiting, or specifying one or both parties’ ability to recover attorney’s fees, parties can put themselves in the best situation to prevent these changes to Chapter 38 from being used against them. **HN**

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ECL Attorney Spotlight



SAKINNA THOMAS HUNTER

ECL member SaKinna Thomas Hunter has always desired to give make access to quality legal counsel available to everyone. Before moving to Texas, Ms. Thomas worked in the criminal modest means program in conjunction with the Indianapolis Bar Association and the Marion County Bar association. Through Ms. Thomas’s pro bono efforts with the criminal modest means program, she successfully won a published appeal in which she was trial counsel and appellate counsel in the Indiana Court of Appeals in the case of *Melvin Washington v. State of Indiana* (Court of Appeals, Indiana, 3/4/2010).

SaKinna’s foundation began with undergrad studies at Prairie View A&M University Class of ‘99 where she graduated magna cum laude and received her J.D. in 2002 from Indiana University-Bloomington where she was a CLEO Grad. She graduated cum laude in the top 30 percent of her class and was a member of the Order of the Barristers.

SaKinna Thomas is currently the lead attorney of her team, Thomas Hunter Legal Group in Dallas County, where she practices Criminal, Family, and Probate law. She prides herself in taking an emotionally intelligent approach to helping her clients get through these difficult legal situations whether it be a felony charge or incarceration, a divorce, or a death in the family.

As a member of the ECL Class of 2021-2022, she has begun to broaden her practice to ensure that her mission, as well as ECL’s mission, of representation of everyday people is achieved for the DFW community.

