

Attorneys Fees in Construction Litigation

Considerations for Seeking or Opposing Recovery of Attorneys Fees

Gordon K. Wright
Cooper & Scully, PC
900 Jackson Street, Suite 100
Dallas, Texas 75202
Gordon.Wright@cooperscully.com

Bases for Recovery of Attorneys Fees

- Contract
 - Prevailing Party
 - One-Sided

- Tex. Civ. Prac. & Rem. Code Chapter 38
 - Recovery for Breach of Contract
 - Performed Labor
 - Furnished Material

Expert Questions Abound

1. Plaintiff needs an expert –
 - Reasonable fees
 - Necessary for work done
2. Defendant may want an expert.
3. Use your own lawyer? Not?
 - Ethical rules may permit it
 - Pros
 - Cost
 - Familiarity
 - Cons
 - Bias
 - Privilege Issues

Expert Issues

- May not want to rely on own work.
- Analysis may be different if you are seeking or opposing
 - Seeking – may want more objective opinion. May want to protect matter from discovery.
 - Opposing – may want to prevent disclosure of your costs.
 - ✓ Designating your lawyer *may* allow discovery of your fees
 - ✓ Defense fees may be more extensive

Segregation of Fees

Torts – No Recovery Permitted

Contracts – Generally Recovery Allowed

Segregation of Fees

Plan Ahead – If you are seeking fees:

- Careful note of what work applies to which claim
- Keep accurate records
 - “Trial preparation” 8 hours
 - Description needs to permit delineation.
- Work for more than one claim – make sure it is explained

Defense Use of Attorney Fees Claims

- Claim for Contract Breach
- Raised as a Counter or Cross-Claim

Segregation of Fees

On the Defense Side

Keep track of fees for cross-claim or counterclaim. You need to know what the fees were for and why.

Privilege Issues

Parties Seeking Attorneys Fees:

- Tries to protect privilege
- Area where privilege can be used as a weapon

Parties Opposing Attorneys Fees:

- Right to see what experts rely on
- Might get around work product privilege
- Attorney-client privilege harder to break

Consider Your Forum

– Federal Court –

Judge generally considers these issues following the trial.

– State Court –

If jury demanded, jury will consider the question unless parties agree to let Judge consider it

Trial Strategy

■ Think About What You are Doing

- Can be used to increase pressure on plaintiff
- May open the issue to discovery by plaintiff

■ How does the issue of attorneys fees affect the rest of the case?

- Juror less inclined to pay lawyer
- Disproportionate to actual damages