

RECENT APPELLATE CASES INVOLVING ATTORNEY'S FEES:  
TEXAS STATE CASES

***Manon v. Tejas Toyota, Inc.*, 2005 WL 772881 (Tex. App.-Houston 2005): Claim For Attorney's Fees Under Chapter 37 (Declaratory Judgment Act) and Chapter 38 (Breach of Contract).**

**Facts:** This case involves a breach of contract claim regarding Tejas Toyota's failure to provide the Manons with a Toyota Sienna minivan conforming to their specifications. The Manons refused to accept concessions offered by Tejas in exchange for the lack of requested features, and instead traded in the van to another dealership in exchange for a more expensive Toyota Sequoia SUV. They then sued Tejas for breach of contract, fraud, negligent misrepresentation, and violations of the Texas Deceptive Trade Practices Act. In damages, they sought either the original price of the minivan or the difference between the price of the SUV and the amount they received for trading in the minivan. Prior to trial, the plaintiffs moved for summary judgment on all claims, including the request for attorney fees. The court granted their motion on contract liability, but denied it on all additional claims (including attorney fees). At trial, the jury found in the Manons' favor and awarded them actual as well as exemplary damages. However, the court found that the Manons failed to introduce proof of reasonableness of their requested attorney fees, and entered judgment for Tejas on that issue. The Manons appealed on the issue of attorney fees, claiming that because they prevailed on their breach of contract claim, an award of attorney fees is mandatory by statute. The Manons argued that an award of attorney fees is mandatory and that they established evidence of these fees as a matter of law. This evidence consisted of an uncontroverted affidavit from their attorney detailing the requested fees and describing the fees as reasonable. This affidavit was contained in their summary judgment motion.

**Holding:** The Court, though acknowledging that fees are mandatory under the Deceptive Trade Practices Act and the Texas Civil Practice & Remedies Code, notes that the party requesting the fees must prove that they are reasonable and necessary. In a jury trial, evidence must be introduced to make this demonstration – a sworn affidavit that is uncontroverted may be enough to prove these fees. In this case, though, the affidavit was produced only at the summary judgment stage and was not presented to the jury as required. Further, while a court is entitled to take judicial notice of the reasonableness of attorney fees, it may do so only if it's acting as a finder of fact. Therefore, once the Manons' motion for summary judgment was denied on the issue of attorney fees, they were required to present evidence of attorney's fees to the jury. They failed to do so, thus the trial court did not err in denying their claim for attorney fees.

- “While a trial court is entitled to take judicial notice of the reasonableness of attorney fees, the Texas Supreme Court has specifically held that a court may do so *only* ‘in [its] role of trier of fact in the conventional trial of a non-jury case *but not in passing on a motion for summary judgment.*’ . . . Therefore, in a non-jury trial, a trial court is entitled to enter

findings of fact that the requested attorney fees are reasonable; but when the case is tried before a jury, the general rule applies, *i.e.*, the reasonableness of the attorney fees is a question of fact for the jury and must be supported by evidence introduced at trial.”

***Wright v. Pino, 2005 WL 852128 (Tex. App.-Fort Worth 2005): Defendant’s Claim for Attorney’s Fees Under Article 4590i.***

**Facts:** Wright was injured in an auto accident and sued three of the physicians who treated her injuries. The trial court granted physician Hodde’s motion to dismiss Wright’s claims against him, and subsequently awarded him attorney’s fees of almost \$11,000, under Art. 4590i. Wright challenged the award of attorney’s fees, claiming: 1) that the court mistakenly awarded the doctor fees in a suit to which he was no longer a party at the time of the award, 2) that because the suit against Hodde was final when his request for attorney’s fees was filed, the trial court’s plenary jurisdiction to grant fees had expired, and 3) that there was no evidence to support the award of attorney’s fees.

**Holding:** Reversed trial court on attorney’s fees based on Wright’s third claim of error. On the first claim, the appeals court found that Hodde’s motion for attorney’s fees, his amended motion for attorney’s fees, and his motion to dismiss were all filed under the present cause number (despite an earlier granting of Hodde’s motion to sever the cause of action against him from the remaining claims). So he was still a party to the suit in which the fees were granted. The court further held that Wright’s complaint is not supported by the record in regard to her claim that the grant of attorney’s fees was beyond the court’s plenary jurisdiction. It notes that the doctor’s dismissal was granted in the cause number under which the claims against the remaining physicians were tried. Therefore, the order of dismissal was merely an interlocutory judgment until all claims were disposed of. The trial court signed the award of attorney’s fees several months before all claims were disposed of; therefore, the court still had plenary jurisdiction and the timing of the award was appropriate. As the plaintiff/appellant’s claim that the court erred in over-awarding costs to the defendant, the Court ruled that such a claim was waived because such an argument is waived on appeal unless preceded by a motion to “re-tax costs” in the trial court:

- “And under *Pitts* we know that errors in specific items should be corrected by a motion to retax costs. *Pitts*, 23 S.W.3d at 417. Because appellant filed no motion to modify or retax those costs, she cannot complain for the first time on appeal that the court erred in awarding some of those costs. However, because appellee Pino agrees that the award for costs erroneously included \$225.71 in charges, we modify the award of taxable costs by that amount to a total of \$4,848.68.” [2005 WL 852128, \*2.]

However, the court reversed the lower court’s judgment and agreed with plaintiff that the evidence of the doctor’s attorney’s *fees* was not sufficient to support an award:

- “The only evidence in support of the attorney’s fees award mentioned in the entire appellate

record is an affidavit that Hodde’s counsel references in the hearing on attorney’s fees and that is listed in appellant’s designation of items to be included in the clerk’s record. However, that affidavit was not attached to Hodde’s amended motion and was never offered into evidence. Therefore, there is no evidence in the record to support the award, and appellant’s third point is sustained.”

The Court reiterated that all such awards must be based upon the factors approved by the Texas Supreme Court in *Arthur Andersen*:

- “Citing the Arthur Andersen opinion, she contends there is no evidence to support a showing of the experience, reputation, and ability of counsel; the nature and extent of the relationship with the client; the nature and extent of the legal services provided; the novelty and difficulty of the questions presented; and the time limitations involved. *See Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818-19 (Tex.1997).” 2005 WL 852128, \*4

***Texas A&M University-Kingsville v. Lawson*, 127 S.W.3d 866 (Tex. App.--Austin 2004); Claim for Attorney’s Fees Under Chapter 37 (Declaratory Judgment Act) and Chapter 38 (Breach of Contract).**

**Facts:** Lawson worked as a music instructor at Texas A&M University-Kingsville (“TAMUK”) and was fired after a dispute with the university. A settlement agreement was reached — it proved that TAMUK would pay Lawson \$62,000, would provide Lawson with positive letters of recommendation, and would respond to inquiries from third parties about Lawson’s employment at TAMUK by stating that he was an “assistant professor.” Lawson, though his position was as an “instructor” at TAMUK, claimed that, but-for his termination, he would have been promoted to assistant professor by the time of the settlement agreement. Several years after the settlement agreement was signed, a potential employer called TAMUK to inquire about Lawson’s employment with the university. TAMUK informed the potential employer that Lawson had been employed only as an instructor. Lawson did not receive the position he had applied for; he then filed suit against TAMUK for breach of the agreement and declaratory relief. The case went to the Texas Supreme Court on the issue of sovereign immunity from suit for breach of contract actions; a plurality determined that no immunity protected the University from suit for breach of a settlement agreement entered in an underlying cause for which immunity was waived. *Texas A&M-Kingsville v. Lawson*, 87 S.W.2d 518 (Tex. 2002). On remand, the trial court held that TAMUK had breached the agreement, but refused to grant one portion of declaratory relief that Lawson had requested (that TAMUK be prohibited from telling Lawson’s prospective employers that the university was involved in litigation with Lawson). Lawson was awarded damages and attorney’s fees. TAMUK appealed.

**Holding:** The Court of Appeals affirmed the lower court (Justice Kidd wrote the opinion). Held, first, that the Texas Civil Practice & Remedies Code, §38.001, does not support the district court’s award of attorney’s fees because TAMUK is not a “corporation” or “individual”. The court then

rejected TAMUK’s argument that, because Lawson’s claim for declaratory relief was denied, at least in part, that the award for attorney’s fees was not supported by the Declaratory Judgment Act of the Texas Civil Practice & Remedies Code). The Court reasoned that as part of the declaratory relief, trial courts have discretion in awarding attorney’s fees, and an award of attorney’s fees does not require that the party “substantially” prevail. Thus the appellate court reviews the award of attorney’s fees to Lawson under an abuse of discretion standard, and upholds the award:

- “Lawson's request for declaratory relief included continued enforcement of the Final Agreement, which TAMUK had breached. Although a breach-of-contract cause of action can provide actual damages, only a declaratory-judgment cause of action can prospectively enforce the breached agreement. Here, the district court's judgment provides this relief, but denies Lawson's request to clarify the Final Agreement to prevent TAMUK from informing prospective employers that TAMUK and Lawson were in litigation. The fact that the district court refused this discrete portion of Lawson's request for declaratory relief does not deprive the district court of its discretion to award attorney's fees under the other prospective declaratory relief requested.” *Id.* at 875.

***Findley v. May*, 154 S.W.3d 196 (Tex.App.--Austin 2004): The method of awarding and collecting attorney’s fees under §106.002 and §157.167 of Texas Family Code.**

**Facts:** Finley and May were divorced in 1998. The wife, Ms. May, was appointed sole managing conservator of their two daughters. Finley was ordered to pay child support. Finley later filed a petition seeking to be appointed sole managing conservator of the girls; May filed a counter petition for increased child support. The trial court denied Finley relief and ordered an increase in his monthly child support payments. It further ordered Finley to pay May’s costs and attorney fees of about \$47,000. The Court deemed that these costs/fees should “be in the nature of unpaid and accrued child support” and ordered \$500 per month withheld from Finley’s earnings for these payments, which were enforceable by contempt. On appeal, the father challenged the contempt and withholding orders, claiming that the Family Code *only* allows attorney fees to be enforceable as debt in non-enforcement suits.

**Holding:** The court addressed a split among the courts of appeals over the awarding of attorney fees as child support in non-enforcement actions and the appropriate standard of review in such cases. It held that the standard of review should be *de novo*. The court then discussed the distinction between awards of attorney fees/costs in suits for enforcement of child support orders and in non-enforcement actions. It held that the Family Code allows attorney’s fees to be levied as child support in suits to enforce a child-support order, meaning that payment may be enforced by contempt. However, it held that the legislature intended to distinguish this situation from suits to modify a child support award. In modification suits, attorney’s fees may only be awarded as costs, which are enforceable *by debt and therefore not punishable by imprisonment*. The court struck the contempt and withholding orders and made the attorney’s fees payable *as ordinary debt*, instead of as child support.

***Telfair v. Bridges*, 2005 WL 309533 (Tex. App.--Eastland 2005): Claim For Attorney's Fees Under Equitable Principles as Damages and under Chapter 38 (Breach of Contract).**

**Facts:** Law firm sued clients for *quantum meruit* award of attorney's fees after it recovered funds on behalf of clients, in a suit for damages based on a defect in the foundation of the Bridges' home. The trial court awarded the law firm a *quantum meruit* award as well as attorney's fees for prosecuting the *quantum meruit* action. The Bridges' counterclaimed, alleging that the law firm misappropriated settlement funds obtained on their behalf in a separate, unrelated personal injury claim. They were awarded damages plus attorney's fees on their counterclaim. On appeal, the law firm attacked the trial court's award of attorney's fees to the Bridges, arguing that no legal basis exists for recovery.

**Holding:** The Bridges are not entitled to attorney's fees under the equitable exception to the general rule that attorney's fees are not recoverable unless allowed by contract or statute. This exception is narrow and "applies when the wrongful act or contractual violation involves the claimant in litigation with third parties and forces the claimant to incur expenses to protect his interests. Such costs and expenses, including attorney's fees, are treated as the legal consequence of the original wrongful act and are permitted to be recovered as damages." (from *Baja Energy, Inc. v. Ball*, 669 S.W.2d (Tex. App.--Eastland 1984)). The *Baja* exception (really the doctrine that permits the recovery of attorney's fees when they are part of a party's out-of-pocket, economic damages) does not apply in this case because the attorney's fees sought by the Bridges are those incurred in the original litigation (defending the *quantum meruit* claim and prosecuting the misappropriation claim) with the party alleged to have committed the wrongful act, rather than in litigation with a third party as required by the exception. Reversed trial court on the issue of attorney's fees.

***Sani v. Powell*, 153 S.W.3d 736 (Tex. App.-Dallas 2005): Claim For Attorney's Fees Under Chapter 37 (Declaratory Judgment Act) in Suit over Real Property to Quiet Title.**

**Facts:** Powell's residence and real property were sold at a tax sale to Sani. Unbeknownst to the taxing authorities, Powell had filed a Chapter 11 bankruptcy petition the day before the scheduled sale. Although the filing of this petition should have triggered an automatic delay of the sale, the property was sold to Sani the next day. Powell sought declaratory relief to quiet title and cancel the deed recorded in Sani's name. He then amended these petitions with a request for declaratory relief, and claimed he was entitled to attorney's fees under the Declaratory Judgment Act. The trial court declared the tax sale to be void and the property to be vested in Powell; Powell's request for attorney's fees was denied.

**Holding:** Appellate court affirmed the trial court's judgment and held that attorney's fees are not available in suits to quiet title to land, and thus that a declaratory judgment action cannot be used just

to obtain attorney's fees that would not otherwise be available:

- “In substance, Powell's claim for declaratory relief is a claim to quiet title. Although Powell couches his claims in terms of a request for a declaration, everything he requests of the court is necessary to, and a component of, the ultimate relief he seeks, which is to clear the Property's title. When the essence of the suit is in trespass to try title, attorney's fees are not recoverable.

***Union Pacific Railroad Company v. Loa*, 153 S.W.3d 162 (Tex. App-El Paso 2004): Claim For Attorney's Fees Under Chapter 21 of Texas Labor Code (Employment Discrimination).**

**Facts:** Loa was employed in the maintenance department of the Union Pacific Railroad Company locomotive facility in El Paso. One of his supervisors constantly harassed him, screaming, yelling, and cursing at him, and often calling him derogatory names based on his Mexican heritage. Other employees experienced similar problems with this supervisor. Despite almost weekly complaints to the facility manager, the supervisor's behavior did not change. After several union leaders sent a letter of complaint to the facility manager, the supervisor was given a reprimand. Unsatisfied with this, Loa filed suit alleging national origin discrimination under Chapter 21 of the Texas Labor Code. The jury awarded Loa \$800,000 in compensatory damages, \$600,000 in punitive damages, and \$400,000 in attorney's fees, plus a conditional amount for appeal. Union Pacific appealed, alleging that the question of attorney's fees in proceedings based on the Texas Commission on Human Rights Act is one for the court to decide, rather than the jury.

**Holding:** The El Paso Court of Appeals agrees with the Corpus Christi Court that when claims are based on employment discrimination under the Texas Commission on Human Rights Act, attorney's fees should be awarded as part of the costs. The proper authority to determine and award costs is the trial court and not the jury, even if one is trying all other issues. Thus the judge should have determined the proper amount of attorney's fees at trial and so plaintiff's claim for fees is remanded:

- “The Texas Labor Code provides for an award of attorney's fees to the prevailing party in a proceeding under the TCHRA, "a court may allow the prevailing party ... a reasonable attorney's fee as part of the costs." TEX. LAB.CODE Ann. § 21.259(a) (Vernon 1996). This court has recognized that "[t]he court may allow a reasonable attorney's fee as part of costs." *Dillard*, 72 S.W.3d at 412. We agree with the Corpus Christi Court of Appeals that "when a claim is made based on employment discrimination under the Texas Commission on Human Rights Act, attorney's fees are awarded as part of the costs. TEX. LAB CODE Ann. § 21.259(a) (Vernon 1996). The trial court is the proper authority to determine and award costs, including attorney's fees authorized as costs under Chapter 21 of the Texas Labor Code." *Id.* at 174.

***Doctors Hospital 1997 v. Sambuca Houston*, 154 S.W.3d 634 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2005)(pet.abated): Claim for Attorney’s Fees Under Chapter 38 (Breach of Contract).**

**Facts:** A music band, suing as Show Business Entertainment, brought suit against Sambuca, a restaurant, and Doctors Hospital, which hosted a party at Sambuca, for payment of the band’s fees for entertainment. Show Business Entertainment prevailed in its suit. Sambuca then prevailed against Doctors Hospital in a suit claiming that the hospital was responsible for the band’s payment. Doctors Hospital appealed on the basis that Sambuca should not have been awarded attorney’s fees, because it prevailed not on a breach of contract theory but on a promissory estoppel theory.

**Holding:** First, the court reiterated the standard of review on appeal of determinations of entitlement to attorney’s fees:

- “Because determining whether a statute provides for attorney's fees is a question of law, our review is de novo. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94 (Tex.1999) ("The availability of attorney's fees under a particular statute is a question of law for the court.")” *Id.* at 635-36.

Then, the Court addressed the issue of whether attorney’s fees are available under Chapter 38, when the plaintiff’s claim is not for breach of contract, *per se*, but rather for Promissory Estoppel. The Court recognized that it might be a “lone voice,” but held that attorney’s fees were *not* available. In Texas, Promissory Estoppel is available only in the absence of a valid and enforceable contract. Sambuca prevailed against Doctors Hospital based on promissory estoppel, and the statute allowing recovery of attorney fees for a valid claim on oral/written contracts (TEX. CIV. PRAC. & REM. CODE §38.001(8) does not expressly allow recovery of attorney’s fees when a promissory estoppel theory is used:

- “If the two previous propositions--that section 38.001(8) authorizes attorney's fees only when a party has a valid contract claim, and a party can recover on promissory estoppel only if it does not have a valid contract claim--are correct, then they are mutually exclusive remedies. If they are mutually exclusive remedies, then section 38.001(8) cannot include a promissory estoppel claim. Were we to hold otherwise, we would have to (1) ignore a long line of cases holding that a recovery under promissory estoppel means no valid contract existed and (2) add a cause of action that the statute's plain language does not include. We intend to do neither of these.” *Id.* at 637.

The Fourteenth Court recognized that other courts and commentators have reached conclusions at variance with its ruling, but the Court explained that it found such holds non-persuasive:

- “In holding that a party may not recover attorney's fees on a promissory estoppel claim, we recognize that we are a lone voice. *See Preload Tech., Inc. v. AB & J Constr. Co., Inc.*, 696 F.2d 1080 (5th Cir.1983); *Traco, Inc. v. Arrow Glass Co., Inc.*, 814 S.W.2d 186 (Tex.

App.-San Antonio 1991, writ denied); *Adams v. Petrade Int'l*, 754 S.W.2d 696 (Tex. App.-Houston [1st Dist.] 1988, writ denied); *Safe Env., Inc. v. Pelzel & Assocs., Inc.*, No. 03-98-00721-CV, 1999 WL 815819 (Tex. App.-Austin Oct. 14, 1999, no pet.) (not designated for publication); *DeNucci v. Moretti*, No. 03-98-00114-CV, 1999 WL 250141 (Tex. App.-Austin Apr. 29, 1999, pet. dismissed by agreement) (not designated for publication). However, the Texas cases holding that attorney's fees may be recovered generally stem from one case: *Preload*, 696 F.2d at 1084-85, 1093-95. *Preload* was the first case to address this dilemma. Noting that no Texas case had addressed the issue, it turned to section 90 of the Restatement (Second) of Contracts. *Id.* at 1094-95. Section 90 addressed promissory estoppel; comment d provided that a binding promise under that section was a contract. RESTATEMENT (SECOND) OF CONTRACTS §90 cmt. d (1981). Without considering the Texas rule that promissory estoppel claims and contract claims are mutually exclusive, the court concluded that section 38.001(8) includes promissory estoppel claims because the restatement treats at least some of these claims as contracts. *Preload*, 696 F.2d at 1093-95. When Texas courts have concluded that section 38.001(8) includes promissory estoppel, they have relied upon *Preload* to some extent. See *Traco, Inc.*, 814 S.W.2d at 193-94 (relying on *Preload*); *Adams*, 754 S.W.2d at 720 (relying on *Preload*); *Safe Env., Inc.*, 1999 WL 815819 at \*3 (citing *Traco, Inc.*, *Adams*, and *Preload*); *DeNucci*, 1999 WL 250141 at \*9 (relying on *Traco, Inc.* and *Preload*). The Restatement notwithstanding, as recently as 2002, the Texas Supreme Court held that the "promissory estoppel doctrine presumes no contract exists." *Subaru*, 84 S.W.3d at 226 (citing *Wheeler*, 398 S.W.2d at 96-97). We think the Texas cases allowing attorney's fees probably did so because the parties did not join the issue as directly as the parties before us. None of the cases discuss Texas's long history of treating contract claims and promissory estoppel claims as mutually exclusive remedies. See *Preload*, 696 F.2d 1080; *Traco, Inc.*, 814 S.W.2d 186; *Adams*, 754 S.W.2d 696; *Safe Env., Inc.*, 1999 WL 815819; *DeNucci*, 1999 WL 250141. Most likely, the parties did not bring that point to the courts' attention. Had the issue been joined--with one party pointing out that a contract claim and a promissory estoppel claim are mutually exclusive--the outcome would have been different. For this reason, we refuse to follow these cases." *Id.* at 637-38.

RECENT APPELLATE CASES INVOLVING ATTORNEY'S FEES:  
FEDERAL CASES

***Positive Black Talk, Inc. v. Cash Money Records, Inc.*, 394 F.3d 357 (5<sup>th</sup> Cir. 2004): Claim for Attorney's Fees Under Copyright Act (17 U.S.C.A. §505).**

**Facts:** Positive Black Talk, and the artist Jubilee, sued Cash Money Records, and the artist Juvenile, for copyright infringement and for unfair trade practices under the Louisiana Unfair Trade Practices Act (LUPTA). Defendants counterclaimed with the same allegations. Each artist had a song containing the same "poetic four-word phrase" (to use Judge King's phrase) Jubilee's was entitled *Back That Ass Up*, while Juvenile's was *Back That Azz Up*. The jury found in favor of Cash Money Records and Juvenile on the copyright claim, finding that Positive Black Talk failed to prove that Cash Money Records copied *Back That Ass Up*, that *Back That Azz Up* was independently created, and that it was not substantially similar to *Back That Ass Up*. Cash Money Records also won in front of the jury on the LUPTA claim. Cash Money Records was awarded in attorney's fees for their LUPTA counterclaim, but not for defense of the federal copyright infringement claim. Defendants appealed this failure to award attorney's fees on the federal infringement cause of action.

**Holding:** The Court lists several factors agreed upon by the Supreme Court in *Fogerty* that should guide courts' discretion in awarding attorney's fees in copyright actions (including frivolousness, motivation, objective unreasonableness, and considerations such as compensation and deterrence). *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The Court held that both plaintiffs and defendants should be awarded their fees under the same legal standard; specifically, a successful defendant should be allowed to seek fees in more situations than when a plaintiff's suit is frivolous or brought in bad faith:

- "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement." *Id.* at 381.

Then, the Court rejected Cash Money Records' claim that the trial court abused its discretion and failed to consider the correct factors in denying attorney fees, despite the general rule that attorney's fees should be awarded routinely in such cases:

- "The *Fogerty* Court noted that "[t]here is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light of the considerations we have identified." 510 U.S. at 534, 114 S.Ct. 1023 (internal quotation marks omitted). However, the Court agreed that a non-exclusive list of factors may be used to guide the district court's discretion; this list includes "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.*

at 534 n. 19, 114 S.Ct. 1023 (internal quotation marks omitted). The Fifth Circuit previously applied these factors to deny a successful copyright defendant's request for attorney's fees." *Id.* at 381.

***Communication Workers of America v. Ector County Hospital District*, 392 F.3d 733 (5<sup>th</sup> Cir. 2004): Claim for Attorney's Fees Under §1988 in Free Speech/Retaliation Case.**

**Facts:** Plaintiff, Mr. Herrera, was a carpenter employed by the hospital, became a member of the Communication Workers of America (CWA). He and several other union members wore "Union Yes" lapel buttons during their work shifts, knowing that this action violated the hospital's dress code prohibiting adornments with insignia. Herrera was confronted by a supervisor — when he refused to remove the button after several requests, he was given a three-day suspension without pay. Plaintiff's pay raise for that year was also decreased because of the disciplinary violation on his record. Plaintiff filed under §1983, and was successful in district court. The hospital appealed.

**Holding:** Upholds the district court's award of attorney fees, based on its upholding of the §1983 violation. Says many of the costs could've been avoided had the hospital not pursued a "scorched earth strategy" in the litigation.

***Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477 (5<sup>th</sup> Cir. 2004): Claim for Attorney's Fees Under Lanham Act (15 U.S.C.A. §1117).**

**Facts:** Fetzer, owner of the KIRBY trademark, sued House of Vacuums for unfair competition, and trademark infringement and dilution after it used the KIRBY mark in one of its advertisements. District Court granted summary judgment to House of Vacuums on all claims, but refused to award attorney's fees. Both parties appealed.

**Holding:** Fifth Circuit upheld the district court's finding that Fetzer did not bring the suit in bad faith and that therefore attorney's fees were not required. First, the court reiterated the applicable standard of review:

- "We review a decision to award attorneys' fees under § 1117 for abuse of discretion and the district court's finding as to whether the case is exceptional for clear error. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 528 (5th Cir.2002)." *Id.* at 490.

Under the Lanham Act, courts are permitted to award attorney's fees to prevailing parties in "exceptional cases." The burden is on the prevailing party to demonstrate the exceptional nature by clear and convincing evidence; this burden equates with showing that the plaintiff brought the claim in bad faith: "A party has not acted in bad faith simply by predicating its legal claim on a controversial and unsettled legal theory." The court explained:

- “To recover attorneys' fees, “[t]he prevailing party must demonstrate the exceptional nature of the case by clear and convincing evidence.” *Id.* at 526. To demonstrate that a case is exceptional, in turn, the defendant must show that the plaintiff brought the case in bad faith. *Id.* at 527-528 & n. 12; *Fuji*, 754 F.2d at 602. A district court should consider the objective merits of the suit in determining whether the plaintiff acted in bad faith. *Procter & Gamble*, 280 F.3d at 527. However, a party has not acted in bad faith simply by predicating its legal claim on a controversial and unsettled legal theory. *Id.* at 531-32. The district court did not clearly err or abuse its discretion. Scott Fetzer's infringement claims do not withstand careful scrutiny, but they are not so implausible as to necessitate an inference of bad faith. Likewise, Scott Fetzer's dilution claims are novel and expansive but not so outlandish that they could not have been brought in good faith.” *Id.* at 490-91.

Finally, the court dismisses the claim that Fetzer, a large corporation, is taking advantage of a small business:

- “House of Vacuums complains that a large, well funded corporation has sued a small, one-man shop. However, a district court cannot consider the parties' relative economic positions when determining whether a case is exceptional.” *Id.* at 491.

***Fluorine on Call, Ltd. v. Fluorogas Limited*, 380 F.3d 849 (5<sup>th</sup> Cir. 2004): Claim for Attorney’s Fees Under Chapter 38 (Breach of Contract).**

**Facts:** Dispute arose over a licensing agreement between Fluorogas Limited and Fluorine on Call (FOC). The contract granted FOC an exclusive license to manufacture fluorine generators based on Fluorogas technology; FOC agreed to pay royalties based on its revenues in return. The memorandum did not contain an express term regarding the duration of the agreement. FOC sued Fluorogas after Fluorogas sent FOC a letter terminating their licensing agreement. A jury found in favor of FOC on its breach of contract and fraud claims; the district court entered judgment for damages plus about \$24 million in attorney’s fees, including about \$22 million based on the company’s contingency fee arrangement with its lawyers.

**Holding:** In Texas, a party who recovers damages on a breach of contract claim *must* be awarded reasonable attorney fees:

- “Under Texas law, a party who recovers damages for a breach of contract claim may recover reasonable attorney's fees. TEX. CIV. PRAC. & REM. CODE § 38.001(8) (Vernon 1997); *Green Int'l Co. v. Solis*, 951 S.W.2d 384, 390 (Tex.1997). If a party has recovered on such a claim, an award of reasonable fees is mandatory. *Mathis v. Exxon Corp.*, 302 F.3d 448, 462 (5th Cir.2002). The amount of reasonable fees, however, is discretionary. *Id.* The Texas Civil Practice and Remedies Code provides a rebuttable presumption that usual and customary fees are reasonable. TEX. CIV. PRAC. & REM.CODE § 38.003 (Vernon 1997). In a proceeding before the court, the judge may take judicial notice of reasonable and customary fees, along

with the case file.” *Id.* at 866-67.

The *amount* of these fees is discretionary with the trial court pursuant to the eight factors articulated by the Texas Supreme Court, in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997):

- the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service 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.

In applying these factors, and not the federal *Johnson* factors (*see Singer v. City of Waco, below*), the Fifth Circuit followed state law and held that while a contingency fee arrangement is relevant to the determination of attorney fees, it’s not enough alone to support an award for fees. The Court held that even when FOC’s lawyers undertook this representation on a discounted and “blended” hourly rate, with a contingency, fees must be based upon the lodestar factors only:

- “In this case, FOC's lawyers had a "blended" fee agreement under which they worked at a reduced hourly rate but also had a contingency agreement. This agreement resulted in a total hourly fee of \$1,643,157.45 (at the reduced rate) and a contingency fee of \$22,438,513. These amounts appear in the district court's order. Using the regular hourly rate of FOC's lawyers, BOC and Fluorogas calculate the actual lodestar amount of fees at \$3.3 million, although they also contend that this is an overstatement. Under this calculation, the \$24 million represented an eight-fold enhancement of the lodestar amount. The district court abused its discretion in awarding such a vast amount of fees, particularly since it originally did so before providing BOC and Fluorogas with an opportunity to respond. Furthermore, in light of our reversal of the lost-asset damages, the results obtained by FOC's lawyers have changed. We therefore remand the attorney's fee award to the district court for reconsideration.” *Id.* at 867.

***American Home Assurance Company v. United Space Alliance*, 378 F.3d 482 (5<sup>th</sup> Cir. 2004): Claim For Attorney’s Fees Under Equitable Principles as Damages and Under Chapter 38 (Breach of Contract).**

**Facts:** This is a contract case involving whether a duty to represent exists under an insurance policy.

United Space Alliance (USA) had a general liability insurance policy under American Home Assurance Company (AHAC). USA was sued by Hi-Shear, a subcontractor with which USA had a contract, for breach of contract and fraudulent inducement. USA requested that it be defended against the suit under its AHAC insurance policy; AHAC denied the request. USA then sued AHAC. The jury found in favor of USA, awarding damages and attorney's fees, both for defense of the contract action and prosecution of the action against AHAC. In other words, this case includes claims for attorney's fees as damages (reimbursement for fees expended when AHAC would not represent the insured, as well as claims for attorneys fees under Chapter 38).

**Holding:** The Court first addressed the award of attorney's fees in the contract action and finds that, in applying Texas law, that reasonable and necessary attorney's fees incurred in litigation with a third party are recoverable as actual damages:

- “Texas courts have held that attorney's fees incurred involving litigation with a third party are recoverable as actual damages. [citations omitted] These courts have stated that the recovery of attorney's fees in such circumstances are appropriately based upon the equitable ground that the claimant was required to defend against litigation as a consequence of the wrongful conduct of the defendant. However, these courts have also held that attorney's fees sought to be recovered as damages must be reasonable and necessary. To show the reasonableness and necessity of attorney's fees incurred, Texas courts have generally held that a party seeking such fees must offer the testimony of a witness who has been designated as an expert, See *E.F. Hutton & Co. v. Youngblood*, 741 S.W.2d 363, 364 (Tex.1987); *Lesikar*, 33 S.W.3d at 307, or at the very least, some testimony by the claimant's attorney that the fees being sought as damages are reasonable. Furthermore, Texas courts have held that a court may take judicial notice of the reasonableness of attorney's fees based on the testimony given. However, these courts have also held that when a court does not clearly take judicial notice of reasonableness, and the testimony offered as to reasonableness and necessity is that of an interested witness, even if uncontradicted, such testimony does no more than raise a fact issue to be determined by the jury.” *Id.* at 490-91.

The Court then ruled that there was an insufficient showing by the insured of its attorney's fees:

- “While United Space argues that section 38.003 provides a presumption of reasonableness for requested attorney's fees, as we explain below, that section only applies to attorney's fees sought as costs incurred in bringing a successful claim for breach of contract. It does not apply to the damages that a successful breach of contract claimant recovers, even if such are attorney's fees. Here, the jury did not have before it any evidence that the attorney's fees incurred by United Space in the Hi-Shear action were reasonable and necessary. It only had before it proof of the internal approval process involved in authorizing the payment of the attorney's fees, and the amount of fees that had actually been paid. Because there was no evidence of reasonableness and necessity offered, there was no evidence to support a finding by the jury that such fees were reasonable and necessary, as is required.” *Id.* at 491.

The Court then addressed the award of attorney's fees in the successful litigation establishing that the insurance policy/contract was breached. The Court first rejected the defense that no fees could be awarded because the insured did not plead that fees under due under Chapter 38 (in fact, the insured's pleadings incorrectly referred to Chapter 37, the declaratory judgment section of the Civil Practice and Remedies Code:

- “The jury also awarded United Space attorney's fees for the instant coverage action against AHAC. United Space correctly notes that section 38.001 provides for a mandatory award of attorney's fees for successful claimants in a breach of contract action. [citations omitted] While United Space did not invoke section 38.001 at trial, such is not required in order for a successful breach of contract claimant to be entitled to an award of attorney's fees under that section. *See Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1500-01 (5th Cir.1992) (en banc) (Where an insured party has clearly presented a claim for attorney's fees, or clearly put the insurer on notice that it would seek attorney's fees, the fact that the insured party failed to mention § 38.001 will not preclude the applicability of that section in the award of attorney's fees). AHAC also cites this court's decisions in *Utica Lloyds of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir.1998) and *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 772 (5th Cir.1999) to argue that United Space is precluded from attorney's fees because it pled attorney's fees under the Texas Declaratory Judgment Act (the "Texas Act"), TEX. CIV. PRAC. & REM.CODE, section 37.009 ("section 37.009"). AHAC asserts that these cases held that the Texas Act could not be the basis for recovery of such fees in a diversity action. The holdings of these two cases do not support AHAC's argument. In *Utica Lloyds* this court denied an insured's request for attorney's fees, not because it had pled section 37.009 instead of section 38.001, but because the court held that even if section 38.001 had been pled, the insurance company was exempted under section 38.006 from paying attorney's fees. 138 F.3d at 210. Also, *Travelers Indem. Co.* is inapplicable because in that case the party seeking attorney's fees did so through a declaratory judgment action, 166 F.3d at 772, while, by contrast, United Space's award of attorney's fees was placed before a jury. Furthermore, the Texas Supreme Court in *Grapevine Excavation, Inc. v. Maryland Lloyds* held that section 38.006 does not preclude the award of attorney's fees unless there is another statute available other than section 38.001 in which an insured could recover attorney's fees from an insurer. 35 S.W.3d 1, 5 (Tex.2000) (Insurance company, which was successfully sued by an insured for refusing to defend a third-party suit under the terms of a general liability policy, was not entitled to a section 38.006 exemption to pay attorney's fees under section 38.001). Here, as in *Grapevine Excavation*, no other statutes exist under which attorney's fees would be available to an insured who successfully sues its insurer for breach of a general liability policy other than section 38.001.” *Id.* at 491-92.

The Fifth Circuit again, held that insufficient evidence had been submitted to justify the fee award and remanded the case. The Court ruled that because diversity jurisdiction existed and the Court was applying Texas law, that the fee determination should have been performed by the jury and thus the “judicial notice” provisions of Texas law were not applicable:

- “We also find that because the issue of the amount of attorney's fees to be awarded here was placed before a jury, the possibility that the district court could have taken judicial notice that United Space met such threshold is precluded. *See e.g., Long Trusts v. Atlantic Richfield Co.*, 893 S.W.2d 686, 687-88 (Tex. App.-Texarkana 1995, reh'g overruled) (In a jury case where the parties agree to submit the amount of attorney's fees to the court, the court may take judicial notice of the usual and customary fees and the contents of the case file and set the fees based on such judicial notice without receiving further evidence); *Carlyle Real Estate Limited Partnership-X v. Leibman*, 782 S.W.2d 230, 233 (Tex. App.-Houston [1st Dist.] 1989) (Section 38 provides that in a proceeding before the court, the court may take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence).”

Lastly, the Fifth Circuit reminded that any fee award must be based upon a request that segregates fees and does not award fees that were expended solely on claims or defendant's upon which the plaintiff did not prevail:

- “Finally, AHAC correctly notes that the issue of segregation of the attorney's fees sought by United Space was never addressed at trial. However, our review of the record reveals that AHAC failed to object to the lack of segregation of fees by either objecting to the jury instructions given which did not require segregation, or by offering jury instructions of its own. The Texas Supreme Court has clearly stated that when a party against whom attorney's fees are sought does not object to jury instructions which fail to segregate attorney's fees, or does not object to the fact that attorney's fees are not segregated as to specific claims, then that party has waived such objection, and the error is not preserved for appeal. *Green Intern., Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex.1997) (citing *Hruska v. First State Bank of Deanville*, 747 S.W.2d 783, 785 (Tex.1988)). However, because we are remanding the attorney's fees awarded as damages for a determination of reasonableness and necessity, and those attorney's fees awarded for the coverage action for a determination as to whether they are usual and customary, we consider whether upon remand, the issue of segregation must nonetheless be addressed. The Texas Supreme Court in *Stewart Title Guaranty Co. v. Sterling* held that the award of attorney's fees based upon evidence of unsegregated fees requires a remand. 822 S.W.2d 1, 11 (Tex.1992). The court in that case, as well other Texas courts in other cases, have stated that segregation is an essential component of reasonableness that a party must show in a request for attorney's fees. *See e.g., Id.* at 10 (Plaintiff requesting attorney's fees from multiple defendants' must segregate the fees so that defendants are not charged fees for which they are not responsible.); *Ralston Oil & Gas Co. v. Gensco, Inc.*, 706 F.2d 685, 697 (5th Cir.1983) (“Those causes for which no recovery for attorney's fees may be had must be segregated and excluded from consideration in determining reasonable attorney's fees.”). However, this court has held that Texas law does not require segregation of attorney's fees when the services rendered relate to: (1) multiple claims arising out of the same facts or transaction, and (2) the prosecution or defense entails proof or denial of the same facts. *See DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 434 (5th Cir.2003) (citing *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37, 41 (Tex. App.–Amarillo

1997, writ denied)); *Coffel v. Stryker Corp.*, 284 F.3d 625, 641 (5th Cir.2002) (citing *Stewart Title Guaranty Co.*, 941 S.W.2d at 73). Because the issue of segregation of attorney's fees was not adequately addressed, we instruct the district court to require United Space to either show segregated fees, or establish why it would not be required to do so as outlined above, for those attorney's fees awarded as damages in the Hi-Shear action.” *Id.* at 494.

***United States v. City of Jackson, Mississippi, 359 F.3d 727 (5<sup>th</sup> Cir. 2004)(Attorney’s Fees Awarded to Federal Government Against City as Contempt Sanctions).***

**Facts:** The US government sued Jackson for violating provisions of the Fair Housing Amendments Act (FHAA) by failing to make the accommodations required to provide disabled people with equal housing opportunities. The parties entered into a consent decree which prohibited the city from engaging in discriminatory practices, required it to amend its zoning ordinance, and set forth remedies for non-compliance. One of these remedies provided for an award of attorney’s fees in the event of a violation of the decree. The government filed a motion for contempt on the basis of violation of the consent decree; the district court held the city in contempt and also awarded the US government \$39,000 in attorney’s fees and expenses.

**Holding:** The Court held that while the city’s claim that the FHAA specifically exempts the federal government from receiving attorney’s fees is correct, its reliance on this provision does not change the fact that the remedial provisions of the consent decree specifically allow the government to be awarded attorney’s fees on violation by the city. The City struck a deal with the government and bound itself to an enforceable judicial order. Insofar as the district court’s authority to award attorney’s fees to the government is concerned, we need to look no further than the plain language of the consent decree.” Furthermore, when awarding such fees, government lawyers are entitled to seek recovery of attorney’s fees at prevailing market rates, and not rates reflecting only the salary paid to its-in-house government employees:

- “We see no reason why the government should not be able to recover a reasonable fee for its attorney's work calculated at the same rate that the attorney would be compensated by the prevailing local economy. In examining the hourly rate of the local legal community, it is irrelevant whether counsel seeking the attorney's fees is employed by the private or public sector. What matters is the attorney's experience and ability. The Third Circuit has reached the same result in the Rule 11 context. In the absence of a more specific governing rule or agreement, the same standard for assessing attorney's fees in favor of the government should apply across-the-board to all of the district court's sanction powers.” *Id.* at 733-34

***Singer v. City of Waco, Texas, 324 F.3d 813 (5<sup>th</sup> Cir. 2003): Claim for Attorney’s Fees Under Fair Labor Standards Act (29 U.S.C.A. §216(b)).***

**Facts:** Waco firefighters brought Fair Labor Standards Act suit against the City, claiming that the

Act prohibited the city's method of calculating their overtime pay. The firefighters prevailed in a jury trial, and the court awarded attorney fees based on the lodestar method. The City challenged all findings.

**Holding:** The Fair Labor Standard Act requires that employers who violate the statute an award of attorney's fees. It is appropriate, as the district court did, to apply the lodestar method. The district court also considered the 12 factors listed in *Johnson* in order to determine whether an increase or decrease in the lodestar calculation was warranted:

- “The *Johnson* factors are: (1) the time and labor required to represent the client or clients; (2) the novelty and difficulty of the issues in the case; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment by the attorney; (5) the customary fee charged for those services in the relevant community; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.” *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d at 717-19 (5<sup>th</sup> Cir. 1974).

The Court found that several factors weighed in favor of an increase, and several in favor of a decrease; therefore, it did not stray from the lodestar amount. The City argued that the attorney's fees award should be lower based on the fact that the firefighters were awarded much smaller damages than they sought (they were awarded “only” \$180,000 instead of the \$5 million that was originally pleaded for), “while a low damages award is one factor which a district court may consider in setting the amount of attorney's fees, this factor alone should not lead the district court to reduce a fee award:”

- “The City argues that the district court should have assessed attorney's fees on an individual basis. The City contends that, if the district court had followed this method, the award would have been lower. The City observes that, after the district court applied the offset, a number of individual plaintiffs were not awarded any damages. The City reasons that, because “attorney's fees awarded under the FLSA are typically assessed based upon the amount of the monetary recovery a plaintiff receives in the matter,” the district court would have awarded a lower amount if it had awarded fees on a plaintiff-by-plaintiff basis. *Brief of Appellee/Cross Appellant City of Waco at 55*. The City essentially contends that the district court should have reduced the lodestar because the fire fighters received a much lower damage award than they sought. As the City apparently recognizes, we have stated that “[t]he most critical factor in determining a fee award is the ‘degree of success obtained.’ ” *Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir.1998) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). In this case, because the fire fighters sought \$5 million in damages, and collected only \$180,000, their monetary success was limited. However, this fact did not require the district court to reduce the lodestar. We have made clear that “while a low damages award is one factor which a district

court may consider in setting the amount of attorney's fees, this factor alone should not lead the district court to reduce a fee award." *Hollowell v. Orleans Reg'l Hosp. LLC*, 217 F.3d 379, 392 (5th Cir.2000); see *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 558 (7<sup>th</sup> Cir.1999) (observing, in a lawsuit initiated under the FLSA, that "an attorney's failure to obtain every dollar sought on behalf of his client does not automatically mean that the modified lodestar amount should be reduced"). In this case, the district court considered lowering the attorney's fees due to the fire fighters low recovery, but declined to do so. *Cf. Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 329 (5th Cir.1995) (observing that the district court's lodestar analysis is inspected primarily to ensure that "the court sufficiently considered the appropriate criteria") (emphasis in original). The district court found that, because other factors weighed in favor of an upward departure, it would have been inappropriate to reduce the lodestar in this case. The district court did not abuse its discretion in declining to adjust the lodestar. *Cf. Heidtman*, 171 F.3d at 1044 (noting the "strong presumption that the lodestar award is the reasonable fee")." *Id.* at 829-30.

***Southwestern Bell Telephone Company v. City of El Paso*, 346 F.3d 541 (5<sup>th</sup> Cir. 2003):  
Claim for Attorney's Fees Under §1988 and Supplemental State Law Claims.**

**Facts:** Southwestern Bell Telephone ("SWBT") brought suit under §1983, claiming violations of the Federal Telecommunications Act (FTA), an illegal taking under the Fifth Amendment, and violations of the Texas Utility Code based on the county water district's policy of requiring payment and detailed applications for permission to install telephone lines across irrigation ditches. The water district counterclaimed. The district court granted summary judgment on behalf of SWBT but denied its request for attorney's fees, as the relief granted was **not** based on §1983.

**Holding:** The Court held that case law from the Supreme Court dictates that attorney's fees may be awarded in §1983 cases, even if the §1983 issue was not decided by the court, under two conditions: "1) the §1983 claim of constitutional deprivation was substantial; and 2) the successful pendent claims arose out of a common nucleus of operative facts." The court finds that SWBT was the prevailing party in this action, that it stated a substantial §1983 claim and that the state law claims arose out of the same facts as the §1983 claim: "Our precedent is clear that if SWBT states a §1983 claim based on the alleged violation of constitutional rights that supports federal question jurisdiction, that is sufficient to support the award of attorney's fees, even if the constitutional claim is avoided by the court."

- "Thus, under our precedent attorney's fees may be awarded even if the § 1983 claim is not decided, "provided that 1) the § 1983 claim of constitutional deprivation was substantial; and 2) the successful pendant claims arose out of a 'common nucleus of operative facts.' " [FN40] A claim is substantial if it supports federal question jurisdiction, and the "common nucleus of operative facts" element must satisfy the test established in *United Mine Workers v. Gibbs* for pendent jurisdiction." *Id.* at 551.

The Court then went on to determine whether Southwestern Bell could be considered a “prevailing party” under 42 U.S.C.A. §1988 and used the following standard:

- “To qualify as a prevailing party, "the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement." [FN42] SWBT is the prevailing party. It is also clear that SWBT prevailed under § 1983, since SWBT stated a § 1983 claim substantial enough to support federal question jurisdiction, [FN43] and the state law claims arise out of the same facts as the § 1983 claims.” *Id.* at 551.

***Coburn Supply Company, Inc. v. Kohler Co.*, 342 F.3d 372 (5<sup>th</sup> Cir. 2003): Claim for Attorney’s Fees Under Chapter 38 (Breach of Contract).**

**Facts:** *Coburn*, a wholesale supplier of plumbing and electrical products, acted as a non-exclusive, at-will distributor of Kohler’s plumbing products. In 1999, after a 60-year relationship, Kohler notified Coburn that it was terminating it as a distributor of its product 105 days after this notice was given. Coburn sued, claiming that Kohler breached its obligation to provide reasonable notice to Coburn before terminating the distributorship. It also alleged that Kohler negligently represented the stability of the relationship between the two companies. The jury found for Coburn at trial on both claims and Coburn was awarded both damages and attorney’s fees on the breach of contract claim. Kohler appealed.

**Holding:** The Court reversed the breach of contract judgment for the plaintiff and thus found that there was no basis for award of attorney’s fees, because plaintiff’s only other cause of action was a tort, for which no fee recovery is permissible under Texas law. The Court states that when tort and breach of contract claims are tried together, Texas law requires that attorney’s fees be limited to the contract claim:

- “As the district court clearly grounded the award of attorneys' fees in this case to Coburn's success on its breach of contract claim, we further hold that the award of attorneys' fees to Coburn as the prevailing party on its contract claim cannot stand. *See Stine v. Marathon Oil Co.*, 976 F.2d 254, 264 (5th Cir.1992) (stating that, when tort and contract claims are tried together, "Texas law requires the attorney's fee be limited to a contract award, it does not permit an award of attorney's fees for tort claims").” *Id.* at 377.