

# I Want a Refund! Recovery of Attorney’s Fees and Costs

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At the beginning of most litigation, recovery of attorney’s fees and costs may seem like an afterthought—either they are available or they’re not—and if they are, go for them. However, there are a number of questions and considerations that should be kept in mind when pleading claims involving attorney’s fees, and when attempting to recover such fees at the end of litigation.

## Are fees or costs available?

First, the default rule in both Texas and several other jurisdictions is that attorney’s fees and costs are not recoverable, unless explicitly provided for by either contract or a statute. This is known as the “American Rule.”

A number of Texas statutes provide for attorney’s fees, including the Texas Theft Liability Act (“TTLA”), Deceptive Trade Practices Act (“DTPA”), and Texas Civil Practice & Remedies Code section 38.001.

However, these statutes have quirks in how they have been interpreted. For example, a recent line of cases holds that, while section 38.001 applies to allow

attorney’s fees in suits for breach of contract against corporations and individuals, it does not extend to partnerships or LLCs. Amendments to the statute that would legislatively veto these holdings have been considered by the Texas Legislature, but none has passed to date.

## Making the claim

Any party seeking attorney’s fees must give fair notice of the claim by pleading it. The basis for the attorney’s fee claim needs to be specifically pleaded. One appellate decision found that because the plaintiff did not plead for attorney’s fees under a contract but rather solely under a statute, fees were only available under the terms of the statute, rather than the more expansive terms in the contract.

Further, in order to prove up fees, the attorney will need to provide expert testimony on the reasonableness of fees, which typically requires disclosure of the attorney as an expert as well as some of the documents associated with billing (such as the fee contract).

## Who gets their fees and costs?

Many contracts and statutes award fees and costs to the “prevailing party” in litigation. However, the definition of when a party “prevails” can vary depending on the goals of the litigation. If a plaintiff brings a breach of contract claim for damages and receives a verdict in its favor, but does not receive damages, then it is typically not a prevailing party. However, a plaintiff seeking declaratory or injunctive relief related to a contract could be entitled to fees under that contract even if it does not obtain damages, because there is still a meaningful

change in the legal relationships between the parties.

Importantly, in most clauses concerning the “prevailing party,” the defendant may be entitled to recover costs for successfully defending against a claim. Zeroing out a plaintiff on damages or obtaining summary judgment dismissing the case are both considered successful defenses. In some cases, even a nonsuit by the plaintiff makes the defendant a prevailing party,

Several Texas cases have held that “costs” as defined by statute are limited to “court costs,” which are typically limited to fees paid to the court or its officers, such as court reporters or clerks.

As a result, “costs” generally does not include items like expert witness fees or even videographers for depositions. Some of the items that would typically be considered “costs,” such as travel expenses, may

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if it is reasonably clear that the plaintiff nonsuited to avoid an adverse judgment. Some of the statutes providing for attorney’s fees, such as the DTPA, may also contain separate clauses allowing a defendant to recover under certain circumstances, such as when a plaintiff has made a claim in bad faith.

## Multiple claims

In a case involving multiple claims where only some of those claims are successful, the fees must be segregated. The requesting party is only entitled to the fees associated with the claims on which it succeeded, so unless all of the claims are so intertwined that they required the same research and factual inquiry, the requestor must separate out which fees are attributable to the successful claim, and which were not.

## Fees or costs?

One other trap for the unwary is in determining what to claim as an attorney’s fee versus a cost.

actually be properly considered attorney’s fees.

## Reasonableness?

Lastly, when proving up attorney’s fees in most circumstances, there is a requirement that the fees were reasonable and necessary. Courts use a set of eight factors known as the Arthur Andersen factors to consider whether fees are reasonable. The attorney seeking fees may submit an affidavit setting forth an analysis of those factors and how they are satisfied; like any affidavit, this must be supported by evidence.

While this article just scratches the surface of the complexities that can be associated with attorney’s fees claims, hopefully it shows just how many legal issues can arise from a simple remedy. To be on the safe side, research any claim for attorney’s fees thoroughly before filing your first pleading in a matter. **AL**