

Texas Supreme Court Creates New Path for Defendants to Recover Attorneys' Fees in Texas – Has Fee-Shifting Swallowed the American Rule?

By: Keith Langley

The Texas Supreme Court recently ruled that a defendant can recover attorneys' fees as a prevailing party. How? The judgment must alter the legal relationship between the parties. *Rohr Moos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 486 (Tex. 2019). Thus, even if a defendant doesn't obtain affirmative relief, it can still recover attorneys' fees as prevailing party. That's exactly what happened in *Rohr Moos Venture* – the defendant (a tenant of University of Texas Southwest) obtained no affirmative relief, but was still a prevailing party under the contract because it successfully defended the landlord's breach of contract claim.



This is the first Texas Supreme Court holding that allows a pure defendant to recover prevailing party contractual attorneys' fees. Before this case, the general rule was that a "prevailing party" needed to obtain at least some damages. This new decision could be a huge weapon for pure defendants in Texas, such as performance bond sureties and CGL carriers where the bond, contract, or policy permits prevailing parties to recover fees and costs.

Often, bonded contracts contain a "prevailing party" attorney fee provision. Because of this decision and the doctrine of "incorporation by reference," Texas performance bond sureties should argue entitlement to contractual attorneys' fees. This can create leverage early on to try to resolve a case without having to go through the time and expense of a trial or arbitration. In cases that proceed to trial or arbitration, the defendant will have an argument to recover its fees from the plaintiff.

In addition to the contractual mechanism for recovering attorneys' fees, Texas has a statutory mechanism: Chapter 38.001 of the Civil Practices & Remedies Code. However, under the statutory mechanism, to be awarded attorneys' fees, the litigant must recover some damages. Thus, a pure defendant can never be a statutory prevailing party, because fees are not considered "damages" in Texas. There are several other hurdles for statutory attorneys' fees. Thus, while the general practice in Texas used to be for sureties to plead for statutory fees or omit pleading for attorneys' fees, a smart surety will plead for contractual attorneys' fees.

Generally, contracts do not define the term "prevailing party." In the statutory attorneys' fee context in Texas, this has generally been held to mean obtaining some damages. In the contractual context, however, the new *Rohrmoos* decision gives a simpler judicial definition: altering the legal relationship. Accordingly, *Rohrmoos* is an important case, particularly for parties that are solely in a defensive posture.

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Moreover, Texas courts have held that in the contractual attorneys’ fees context, where the provision does not have a “reasonableness” qualifier for recovery of fees and costs, the prevailing party may not need to prove reasonableness — particularly if the contracting parties are sophisticated entities. *Basic Energy Services, L.P. v. EXCO Resources, Inc.*, 2018 WL 564157, *7 (Tex. App. – Dallas 2018, pet. denied). If reasonableness is a condition, courts look to whether the contract defines it. If the contract does not, Texas courts look to the precedent in *El Apple, I Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012) and *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997).

Unless the contract or statute permits attorneys’ fees, Texas follows the American rule, meaning litigants are responsible for paying their owns fees and costs. *Intercontinental Grp P’ship v. KB Home Lone Star, LP*, 295 S.W.3d 650, 653 (Tex. 2009). However, with the Texas statute permitting attorneys’ fees in breach of contract cases where certain steps and conditions are met, and with construction contracts often having fee-shifting clauses, the American Rule appears to be the exception in Texas, rather than the rule.

Accordingly, read the contract carefully and look at the case law to recover attorneys fees, as a plaintiff or a defendant.