

## Brokers Beware: Recovering Attorneys' Fees Against LLCs in Breach of Contract Disputes

by Dan McGuire

For a business broker, the closing of a deal represents the culmination of untold client meetings, calls, due diligence, and herculean efforts to ensure that the transaction is fully realized. The joy from closing a deal, however, can be short-lived if a dispute arises with clients, customers or third parties over commissions or other aspects of the brokerage agreement itself.

If a legal dispute arises, a chief concern for all parties is how much it will cost to pursue or defend against a claim, and whether a party may recover the attorneys' fees it incurs as part of the dispute. Indeed, attorneys' fees can often tip the scales either in favor of, or against, pursuing a claim and initiating litigation.

Like many other states, Texas follows the "American Rule," which requires parties to a dispute to bear their own attorneys' fees unless specifically provided by contract or statute.<sup>1</sup> By contrast, the "English Rule" requires the losing party in a legal dispute to pay its own attorneys' fees, as well as the attorneys' fees of the other parties in the case.

Section 38.001 of the Texas Civil Practice and Remedies Code is one such exception to the American Rule. It provides that a "person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs," if the claim is for "rendered services," "performed labor," or "an oral or written contract."<sup>2</sup> This statute has long served as the primary basis for recovering attorney's fees in breach of contract disputes.<sup>3</sup>

For decades, attorneys and judges throughout Texas allowed the recovery of attorneys' fees under § 38.001 against limited liability companies, assuming, without much analysis, that LLCs

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<sup>1</sup> *MBM Fin. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009).

<sup>2</sup> TEX. CIV. PRAC. & REM. CODE § 38.001.

<sup>3</sup> This statute was passed by the Texas Legislature in 1985.

qualified as “corporations” under the statute. However, a recent decision from the Houston Court of Appeals has put an end to that interpretation.

In *Alta Mesa Holdings, L.P. v. Ives*, the plaintiffs brought claims against several LLC defendants for breach of contract.<sup>4</sup> The plaintiffs were successful on their breach of contract claim at trial, and the trial court awarded plaintiffs their attorneys’ fees under § 38.001. On appeal, the court held that the plaintiffs could not recover attorney’s fees against an LLC under § 38.001, because an LLC is not an “individual or corporation” as required under § 38.001.

In reaching this conclusion, the court rejected the plaintiffs’ argument that LLCs and corporations often receive the same treatment under both Texas law and Delaware law (the state of the LLC’s formation). Although the court acknowledged the often-synonymous nature of the words “company” and “corporation,” it nevertheless held that, under Texas law, “the legal entities identified by the terms ‘corporation’ and ‘limited liability company’ are distinct entities with some but not all of the same features.”<sup>5</sup>

The court’s holding in *Alta Mesa* followed the reasoning of its own recent decision and a 1997 Texas federal court decision holding that attorneys’ fees could not be recovered against other legal entities that were not “corporations” under § 38.001, such as limited partnerships (LPs) and limited liability partnerships (LLPs).<sup>6</sup>

This decision interpreting §38.001 will have a significant impact on both plaintiffs and defendants currently in litigation, or contemplating litigation, involving LLCs in Texas. If a broker is an LLC, for instance, the broker will not be liable for attorneys’ fees in defending against claims based on a contract or brokerage agreement. Similarly, if the broker’s dispute is with a client or third party that is an LLC, the unavailability of recovering attorneys’ fees may influence the broker’s interest in pursuing a breach of contract claim against the client or third party.

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<sup>4</sup> 488 S.W.3d 438, 452-55 (Tex. App.—Houston [14th Dist.], pet. filed June 30, 2016)

<sup>5</sup> *Id.* at 453-54.

<sup>6</sup> *Fleming & Associates, L.L.P. v. Barton*, 425 S.W.3d 560, 574-76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (plaintiff could not recover attorney’s fees from limited liability partnership); *Ganz v. Lyons P’ship, L.P.*, 173 F.R.D. 173, 176 (N.D. Tex. 1997) (holding that § 38.001(8) did not authorize recovery of attorney’s fees against limited partnership).

Brokers, however, are not without recourse. For example, a declaratory judgment claim under chapter 37 of the Texas Civil Practice and Remedies Code, which can be used to declare the rights and obligations of parties to a contract, allows the court to award “reasonable attorneys’ fees as are equitable and just.”<sup>7</sup> Although the recovery of attorneys’ fees based on a declaratory judgment is at the court’s discretion, a convincing argument can be made on behalf of the broker that attorneys’ fees should be awarded against an LLC defendant because of the recent Court of Appeals decision concerning attorneys’ fees under § 38.001.

There may also be certain factual scenarios that support the recovery of attorneys’ fees under other, more narrow statutory grounds. Nevertheless, brokers engaged in breach of contract disputes in Texas must be aware of these recent legal developments and correspondingly adjust their dispute-resolution strategies.

Armed with a sophisticated legal approach to a dispute, brokers just might be able to regain the elation of closing a deal after all.



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<sup>7</sup> TEX. CIV. PRAC. & REM. CODE §§ 37.004, 37.009.