

# Attorney's Fees in a Post-*Rohrmoos* World



# Overview

- Teaching at law school—why attorneys' fees?
- New developments
  - Interesting new cases
  - Legislative update
- Lasting impact of *Rohrmoos Venture* (Tex. 2019)
- Appellate issues: why not render?
- Battleground issues
- Some traps to avoid/other “hot topics”





# ***Rohrmoos Venture*** **(Tex. 2019)**

**The key framework for fee-shifting:**

**(1) recovery of attorney's fees is legally authorized,  
and**

**(2) “the requested attorney’s fees are reasonable and necessary for the legal representation, so that such an award will compensate the prevailing party generally for its losses resulting from the litigation process.”**





# ***Rohrmoos Venture— Texas 2-step***



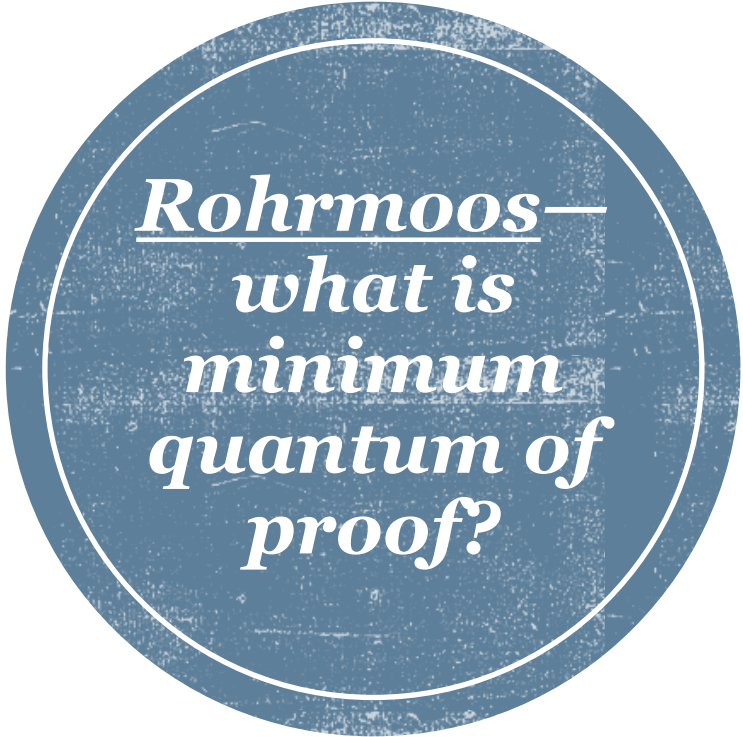
- **Step 1:** The fact finder's starting point for calculating fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts.
  - Rate X time
  - Presumed reasonable
- **Step 2:** Potential Adjustment if warranted by *Arthur Andersen* considerations
- Applies in both jury and bench trials
- MSJ?
- Other early dismissal



# *What about alternative fee arrangements?*

- **Contingency fee\$?—**
  - *Arthur Andersen v. Perry* (Tex. 1997)
  - Market rate
- **Flat Fee\$?**
- **What evidence works and doesn't work?**





*Rohrmoos*—  
*what is  
minimum  
quantum of  
proof?*

**Framework applies to all fee-shifting situations, including sanctions.**

**The party seeking fees must present evidence of:**

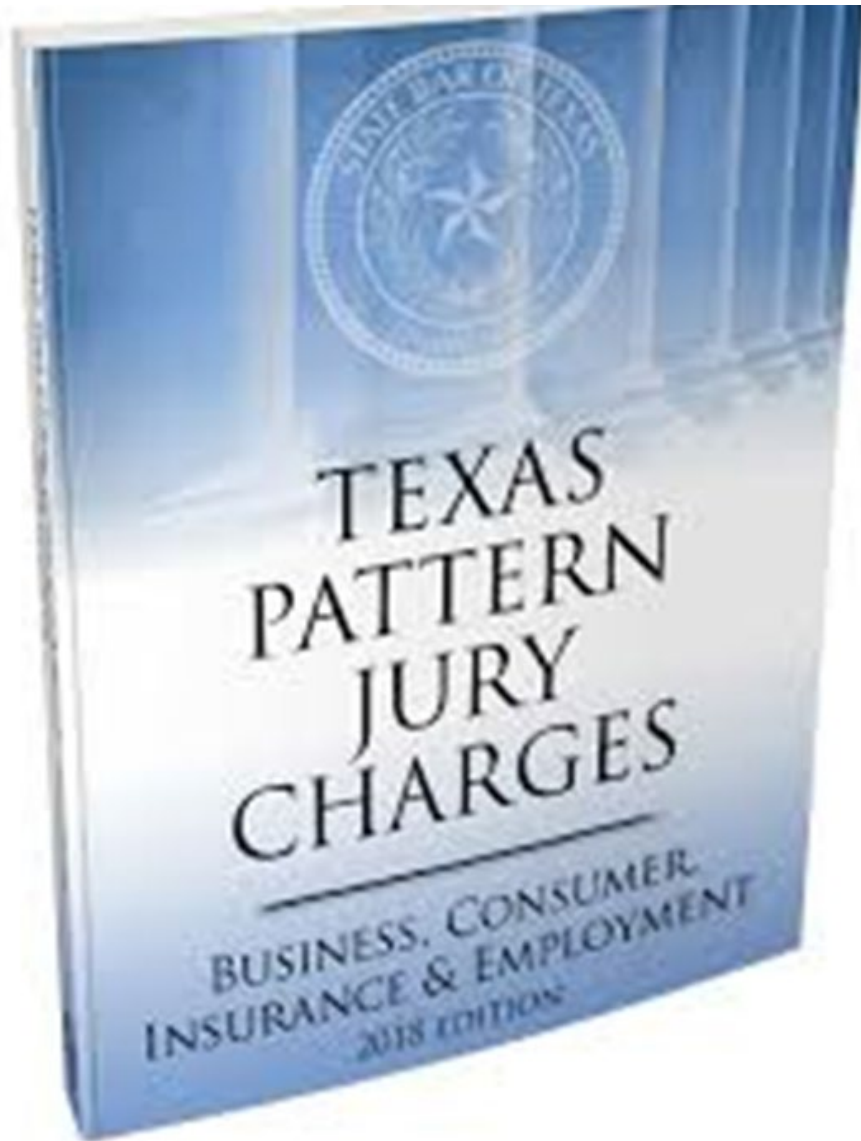
- 1. particular services performed;**
- 2. who performed those services;**
- 3. approximately when the services were performed**
- 4. the reasonable amount of time required to perform the services; and**
- 5. the reasonable hourly rate for each person performing such services.**

## **Rohrmoos—other key observations**

1. **Compensate the prevailing party generally for its reasonable losses from litigation process.**
2. **Belong to client, “not a mechanism for greatly improving an attorney’s economic situation”**
3. **Fees not properly billed to client, not proper to shift**
4. **Market rate**
5. **No difference between reasonable and “reasonable and necessary”**







## *Rohrmoos Venture*

Fact finder must determine a base lodestar figure and in a jury trial, the jury should be instructed that:

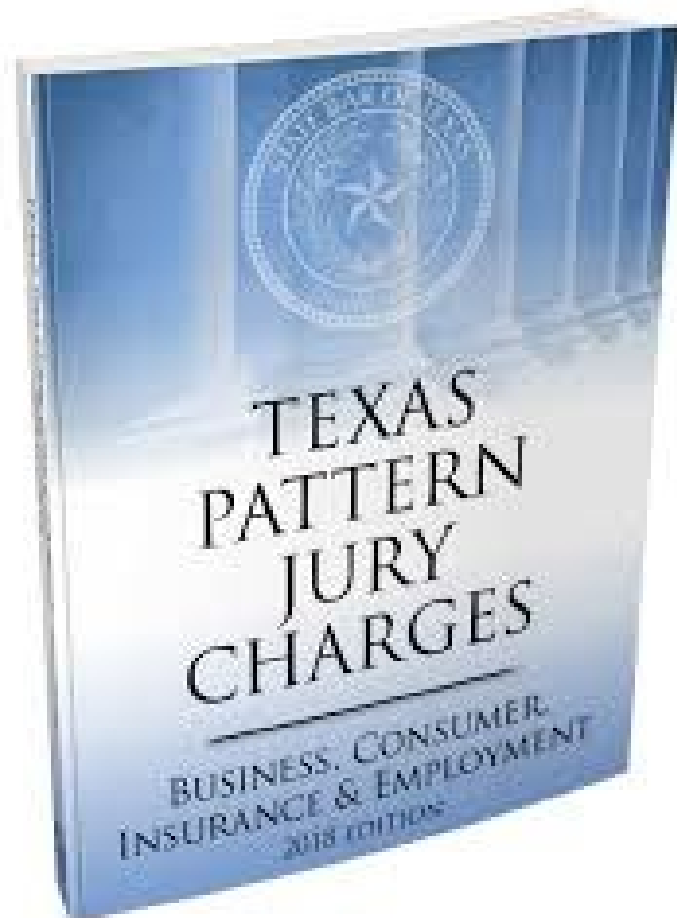
“the base lodestar figure is **presumed** to represent reasonable and necessary attorney’s fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine whether evidence of those considerations overcomes the **presumption** and necessitates an adjustment to reach a reasonable fee.”

*Rohrmoos Venture* at 501.





# Jury charge considerations



- PJC always a good start—appellate fees
- Add segregation instruction(s)?
- Potentially add more
  - Add “presentment”?
  - Add excessive demand question?
  - Add *Arthur Andersen* considerations?



# ***Ortiz v. State Farm Lloyds*** **(Tex. 2019)**

For insurance prompt pay cases—like Chapter 38 cases—recovering damages is a prerequisite to attorney's fees.

Practice pointer→ properly condition the charge



# Legislative Update

The “Chapter 38 problem”

The legislative fix

- § 38.001 amended to swap “organizations” for “corporations” (fixes the problem)
- New § 38.0015 added making attorney’s fees compensatory damages in breach of construction contract cases





# ***What does it mean to prevail?***

- Is it different for plaintiffs and defendants?

*Sunchase IV  
HOA, Inc. v.  
Atkinson,  
(Tex. Apr. 8,  
2022)—  
Prevailing  
Parties*

- Uniform Condominium Act Tex. Prop. Code § 82.161 & Ch. 37
- Because Sunchase was a prevailing party under the Act, the Court did not reach the Chapter 37 issue
- Key: “prevailing party” & different for defensive parties
  - Not like a prevailing claimant to obtained “damages or otherwise obtained affirmative relief”
  - A defendant seeking fees who needs only defeat the claims and does “not need to show it was adversely affected by a violation of Chapter 82 or obtain damages to qualify as a prevailing party under Section 82.161(b).”



# ***Hrdy v. Second Street Properties LLC,*** (Tex. App.—Houston [1st] 2022)

## **Complexity of “who prevailed & how much prevailing”:**

- On appeal, both sides insist they prevailed at trial
- What is the “main issue(s)”?
- Partnership agreement—weight to document?
- “singular noun”
- Rejecting argument that couldn’t “be right”





# ***Blaffer v. Second Street Properties***

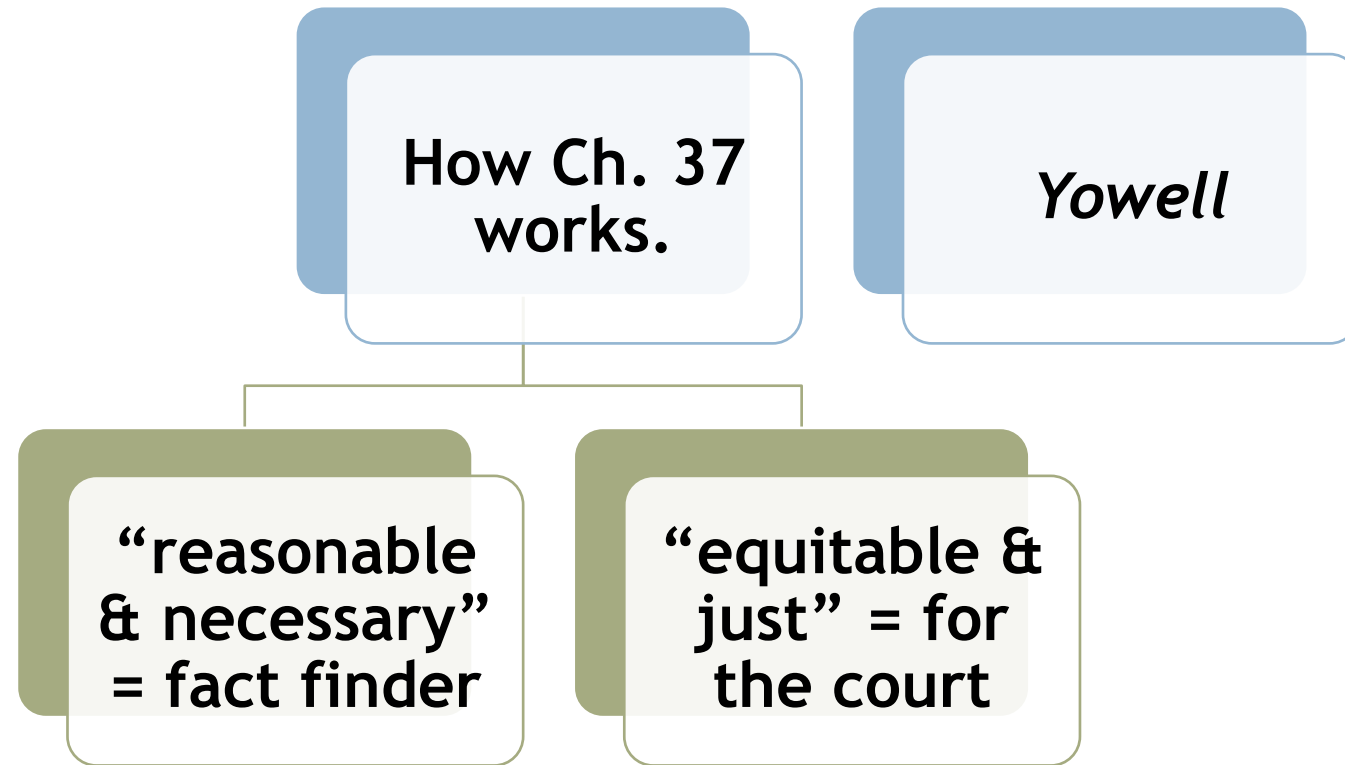
## **22-0633**

- Second Street/Royall's Cross-Petition (Feb. 13, 2023):
  - “unquestionably won” on 3 of the 4 main issues at trial and ordered to pay \$1 (*KB Homes*)— “who prevailed?”
  - “state’s jurisprudence needs a ‘prevailing party’ definition that is correct, stable, and predictable”
  - Claims COA applied a “any-relief-suffices rule”
  - Summary: successfully prosecutes or defends “even though not to the extent of original contention” *WWW.Urban.Inc. v. Drummond* (Hou 2016)
- Hrды and Non-Petitioning LPs (Feb. 13, 2023):
  - Didn’t petition & not significant
  - Prevailed on the main issue in the underlying litigation
  - Agrees on test, claims Royall merely disagrees with application



*If we are sued, can't we just counterclaim per DJA under Ch. 37?*

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# “Mirror image rule”

- did not reach the Chapter 37 issue (*Sunchase*)
- *Transcor Astra Group, SA v. Petrobras America, Inc.*, (Tex. Apr. 29, 2022) (rejecting contention that issue already in case)
- *Ramey & Schwaller, LLP v. The Document Group, Inc.*, (Tex. App.—Houston [1st] May 19, 2022)(sustaining objection that DJ had no material distinction to breach of contract claim already in case).





*Do we get all our fees because all of the claims are interrelated?*

- Apportionment/segregation
- *Chapa v. Tony Gullo* (Tex. 2006)
- Claim by claim basis—*Horizon Health* (Tex. 2017)
- Usually remedy is remand, but like many things (*Snowden v. Artesia Wells CC* May 21, 2020), can be waived





A close-up photograph of a person's hand, with the index finger pointing towards the text on the right. The hand is resting on a dark wooden table. The background shows a wooden floor with a parquetry pattern.

## ***Transcor Astra Group, SA v. Petrobras America, Inc.,*** **(Tex. Apr. 19, 2022)**

- Segregation of fees sometimes strictly required
- Segregation defense can be waived
- Simple contract & fraud claims is one thing
- Can't just say "intertwined"
- However, Court endorsed the continuing vitality of sufficiently "intertwined" nature of attorney's fees to permit recovery





***James  
Construction  
Group, LLC v.  
Westlake  
Chem. Corp.,  
(Tex. May 20,  
2022)***

- **Construction dispute**
- **Proportionality of fees to amount in controversy/award**
- **Here, the TX SCt reversed and remanded attorney's fees award of nearly \$3 million in light of reduction of damages award to \$102,767,69**





# *What about freedom of contract?*

Parties may contract to:

1. Alter grounds/requirements (*Venture Cotton Coop*)
2. *Hjella v. Red McCombs Motors* (SA 2022)—no damages required
3. Why are these provisions not more specific?
4. Define terms
5. Waive segregation?
6. Fee waiver v. older cases (specificity required)?



# *Does freedom to contract exchange to choice of law?*

- Yes
- If the non-Texas jurisdiction does not recognize a right to recover (as in the case of Chapter 38's authorization of fees for a breach of contract), then the application of a foreign law could be outcome determinative.
- *OIC v. Gleason*
- *Transverse* (5<sup>th</sup> Cir. 2022)
- *1701 Commerce Acquisition* (Tex. App. Ft Worth 2022)





# Read and plead statutes and contracts

- Mind the pleadings
- Plead the basis
- Challenge pleadings
- 200+ statutes
- Language in contracts matters
- Satisfy procedural requirements
  - Stipulations?
  - (*Hotze*) (pet. filed)—affidavit of fees after verdict is not trial evidence





## Modern challenges:



In addition, one of the Appellants' appellate issues complains that "The trial court erred in awarding attorney's fees against CIPE and Plan B because [\[Tex. Civ. Prac. & Rem. Code § 38.001\]](#) does not allow recovery of attorney's fees against limited liability companies." In response, the Appellee argues that the Appellants failed to preserve such error in the trial court. In response to this argument, the Appellants argue that their attorney did specify—and thus preserve—the alleged error during a post-trial hearing but that his argument on that subject was transcribed by the court reporter as "inaudible zoom" and was not later corrected. *See* Reporter's Record Volume Supplemental 5, "Motion to Enter," May 12, 2021, at page 11. The trial court overruled the objection.

*Plan B Holdings, LLC v. RSLLP* (Dec. 20, 2022) (remanding about record)



# Presentment

- Chapter 38 Requirement
- Purpose—30 days notice w/o incurring fees
- No one form of presentment
- *Swoboda* (Tex. App. [Houston 1<sup>st</sup>] 2019)
  - Presentment and excessive demand—
  - Plead and challenged
  - Can be waived
- *Sandberg* (Tex. App. Dallas April 2020, reh. filed)
  - Return of laptop e-mail sufficed
  - Must plead & prove



# What about Attorney's Fees in non-compete cases?

- Bus & Com Code 15.52
- *Buccees*
- *D'Onfrio*
- *But see Sandberg* (waivable)
- And see *Leavitt*
- May not apply to non-disclosure/breach of CI





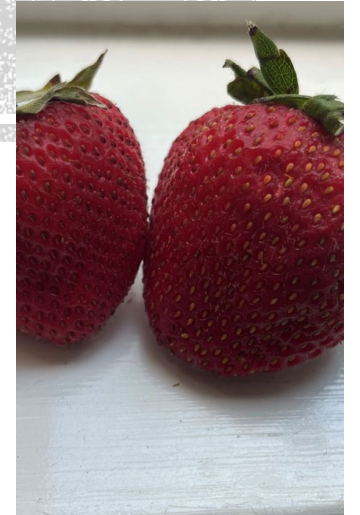


# TTLA Conspiracy- 2023 Update

- *Civelli v. JP Morgan Securities, LLC*, (5<sup>th</sup> Cir. 2023)
- Applying Texas law,
- a party that prevails in a civil conspiracy claim predicated on a TTLA claim is entitled to fees



# Challenging mandatory fees



- *Hotze* (pet filed), *TTLA*
- *Davis v. Credit Bureau of the South* (5<sup>th</sup> Cir. Nov. 2018) (deny FDCPA)
- *Gurule v. Land Guardian, Inc.* (5th Cir. Dec. 2018) Judge Ho:
  - Fees for benefit of client to obtain competent counsel
  - Creating value for client
  - Overarching question: did attorney expend time “in good faith pursuit of value for the client” or “engaged in churning attorney fees”
- Court explained reason for award in FLSA case
- Most critical factor is success (*Berry v. Berry*)
- Court should consider prevailing party’s rejection of Rule 68 offer (TRCP 167?)



# Other Battleground Issues

- “Billing judgment”
- Travel time
- Duplicative entries
- Failed claims
- Proportionality—*Johari v. Ayva Center* (Tex. App. [Houston 14<sup>th</sup>] Feb. 2020) (alone not enough to defeat fee claim)
- Differences in federal court
- “Block billing” & the related issues of excessive redaction
- “Lions of the bar”
- Discovery
- Media work?
- Coordinating with amicus?
- Unclear COA—*Raym v. Tumelo Mngmt*, (Tex. App.—Fort Worth Jan. 6, 2022) (affirming fees for promissory estoppel)





# Appellate issues: why not render and why so many remands?

- **Proportionality of fees to amount in controversy/award:** *James Const. Group, v. Westlake Chem.*, (Tex. May 20, 2022)
  - (attorney's fees award of nearly \$3 million in light of reduction of damages award to \$102,767,69)
- **Apportionment/segregation**
  - DTPA
  - "Pure torts"
- **Appellate fees**
  - *Yowell* (Tex. 2020), *Kinsel* (Tex. 2017)
  - Who is your expert?



# ***Bertucci v. Watkins***

**(Tex. App.—Austin Aug. 12, 2022)**

- Don't sever attorneys' fees claims b/c these are not "a standalone claim for relief"
- Abate for 30 days for an appealable order
- Another difference with federal practice

