



In the News

A Recurring Atty Fee Question Returns To Texas High Court

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Generally, a party must segregate recoverable from unrecoverable attorney fees being sought in a case. Three prior Texas Supreme Court opinions have addressed an exception to this rule.[1]

Nonetheless, on Feb. 5, the petitioner in *Maciejack v. City of Oak Point, Texas*, filed its reply in support of petition for review with the Texas Supreme Court, which, among other things, directly addresses this issue.[2]

Therefore, the stage is set for the Texas Supreme Court to decide if, yet again, it will address this issue and further confirm, clarify or otherwise change Texas law on when a party must segregate attorney fees it seeks to recover.

This article examines the seminal Texas Supreme Court decisions on this issue, competing arguments of the parties in the *Maciejack* case, and other Texas cases addressing when a party must segregate attorney fees it seeks to recover.

In the meantime, litigators would be wise to continue to segregate recoverable and unrecoverable attorney fees, unless discrete legal services advance both recoverable and unrecoverable claims.

The Supreme Court Backdrop on Segregating Attorney Fees

The Texas Supreme Court has adhered to the so-called American Rule.[3] Namely, parties ordinarily are required to pay their own attorney fees. Accordingly, a trial court does not have the inherent authority to award a party its attorney fees against the opposing party without a contract, statute or other legally accepted doctrine allowing for such an award.

Moreover, even when attorney fees are allowed in a case, parties are typically required to segregate recoverable from unrecoverable attorney fees being sought.[4]

And here arises the issue discussed in this article. There is a recognized exception to this general rule requiring a party to segregate its attorney fees — albeit still apparently a murky one for some parties and courts, as further discussed below.

In *Stewart Title Guaranty Co. v. Sterling* in 1991, the Texas Supreme Court held:

A recognized exception to this duty to segregate arises when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their "prosecution or defense entails proof or denial of essentially the same facts." Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are "intertwined to the point of being inseparable," the party suing for attorney's fees may recover the entire amount covering all claims.[5]

However, by 2006, the court in *Tony Gullo Motors I LP v. Chapa* felt that the exception pronounced in *Sterling* "threatened to swallow the rule" requiring segregation of fees and stated, "the courts of appeals have been flooded with claims that recoverable and unrecoverable fees are inextricably intertwined." [6]

In the *Chapa* opinion, the court further recognized: "The exception has also been hard to apply consistently. The courts of appeals have disagreed about what makes two claims inextricably intertwined." [7]

Therefore, the court reigned in the exception established in the Sterling opinion. Although different recoverable and unrecoverable claims could all be dependent on the same set of facts or circumstances, as suggested in Sterling, the Chapa court held:

[T]hat does not mean they all required the same research, discovery, proof, or legal expertise. Nor are unrecoverable fees rendered recoverable merely because they are nominal; ... To the extent Sterling suggested that a common set of underlying facts necessarily made all claims arising therefrom “inseparable” and all legal fees recoverable, it went too far.[8]

The court recognized that Sterling was correct that legal fees sometimes cannot and need not be precisely allocated to one claim or another, that a host of services may be necessary whether a claim is filed alone or with others, and that services that would have been incurred on a recoverable claim also are not disallowed.[9] Nevertheless, the court in Chapa held:

Accordingly, we reaffirm the rule that if any attorney’s fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. We modify Sterling to that extent.[10]

In so holding, the court recognized that it may often be impossible to state as a matter of law the extent that certain claims can be segregated and, thus, the issue is more a mixed question of law and fact. The court also provided examples of where — despite being required to prove essentially the same facts for a recoverable and unrecoverable claim — this type of scenario does not necessarily mean fees for the unrecoverable claim are recoverable.[11]

Moreover, the court expressly stated that “Chapa’s attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim.”[12]

Nearly a decade later, in *Kinsel v. Lindsey*, the court applied Chapa and held the exception applies “only when the fees are based on claims arising out of the same transaction that are so intertwined and inseparable as to make segregation impossible.”[13]

Some Examples of Texas Courts Trying to Interpret Chapa

Texas courts — even after Chapa — have continued to apply the exception in different ways to reach different results. Some courts have still focused on intertwined facts, largely relying on Sterling and despite citing Chapa.[14] Other courts have reasoned that the failure to segregate some unrecoverable attorney fees does not preclude a recovery of attorney fees, and sometimes kick it back down on remand for the trial court to figure it out.[15]

Moreover, parties have continued to demonstrate confusion about when and where to draw the line for the segregation of fees.[16] In fact, in one presently pending appeal before the Fort Worth Second Court of Appeals, *Durant v. Sheridan*,[17] the parties again have taken on the segregation issue.

The parties all cited Chapa, and submitted factual and legal arguments as to why the trial court did and did not properly segregate recoverable from unrecoverable attorney fees between the breach of written contract claim versus the breach of oral contract and fraud claims (resolved against the appellees), and defense of breach of fiduciary duty claim.

The briefing also includes arguments as to how a fee-shifting provision in a relevant contract affects whether a party must segregate the recovery of attorney fees for both recoverable and unrecoverable claims.[18]

Texas Supreme Court's Potential Review of Segregation Standard

In the Second Court of Appeals' decision in *Maciejack*, among other things, the court addressed the issue of whether the City of Oak Point was entitled to attorney fees when it did not segregate the recoverable from the unrecoverable fees.[19]

The court of appeals affirmed the Denton County District Court's determination that segregation of fees was not required. After citing the exception language from the *Sterling* opinion and a "see" cite to *Chapa*, it held segregation is not required when "exactly the same set of operative facts" applied to the claim for which fees were recoverable and the claim for which they were not — further noting that the essential proof was the same between the claims.[20]

The issue presented to the Texas Supreme Court, according to the petitioners, Tiffany Maciejack and Mike Maciejack, is whether the "Court of Appeals erred by affirming the City's recovery of unrecoverable attorney's fees absent segregation based on an outdated reading of *Sterling* and contrary to the requirements set forth in the *Chapa* ruling." [21]

According to the petitioners, "appellate courts still overlook *Chapa*'s limitations on *Sterling* and read *Sterling* as excepting the need for fee segregation," [22] where "even 'intertwined facts' are still subject to a segregation analysis." [23] The petitioners argued, "the simple fact that a non-recoverable claim exists in the case will require some segregation, even if ultimately nominal" because "time spent drafting portions of pleadings, motions, and discovery on the non-recoverable claim must be segregated." [24]

Nonetheless, the petitioners argued segregation is not necessary if "every task did double (or triple) service, or that segregation was impossible." [25] But the petitioners did not give any examples drawing the line as to when segregation is impossible.

While the respondent, the City of Oak Point, made some additional arguments as to why the attorney fees award should stand, its main response (as it relates to this article) was that "there is no meaningful distinction among the claims asserted by the parties" and the respondent's defenses. [26]

The respondent argued the exception applies because the relevant legal services for the recoverable and unrecoverable claims are intertwined. [27] Implicitly it seems, the respondent has suggested that the petitioners' interpretation basically eliminates the "inextricably intertwined exception to the segregation rule," as explained in its Jan. 6 petition response. [28]

Takeaways

The stage is set for the Texas Supreme Court to decide if, yet again, it will address and reset, or clarify, Texas law on when a party must segregate attorney fees it seeks to recover. In the meantime, litigators would be wise to continue to segregate attorney fees, unless discrete legal services advance both a recoverable and unrecoverable claim.

If they do, litigators should consider providing a claim-by-claim reasoning as to why — e.g., addressing prefilings research and investigation, pleadings, elements of claims, intertwined facts, discovery, motion and briefing practice, and pretrial (such as jury charge and motions in limine) and trial work. Consider what proof will be required to establish such a claim-by-claim analysis and maintain appropriate records of services performed.

Depending on the nature of the claims and attorney fees involved, litigators may want to consider giving a reasoned and reasonable discount of the total intertwined fees by a percentage to account for any potential unrecoverable fees — with a disclaimer addressing the position as to why the discrete legal services advance both recoverable and unrecoverable claims. [29]

Moreover, if a relevant contract contains a broad fee-shifting provision, plead the terms of that provision as it relates to the recovery of attorney fees for both recoverable and unrecoverable claims, as well as any statutory bases.

And, although beyond the scope of this article, attorneys should endeavor to satisfy what is commonly referred to as the "lodestar" process to establish a claim for shifting of attorney fees, [30] and include properly redacted and contemporaneous billing records. [31]

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[1] See *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11–12 (Tex.1991), holding modified on other grounds, *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311-315 (Tex. 2006); *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017).

[2] No. 02-23-00248-CV, 2024 WL 3195851 (Tex. App.—Fort Worth June 27, 2024, pet. filed) (mem. op.); see also Reply Brief for Petitioner, No. 24-0783, 2025 WL 509459 (Tex. Feb. 5, 2025).

[3] *Chapa*, 212 S.W.3d at 310-11; see also *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 382 (2013) (“Under the bedrock principle known as the ‘American Rule,’ each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.”).

[4] E.g., *Chapa*, 212 S.W.3d at 310-311.

[5] *Sterling*, 822 S.W.2d at 11 (citations omitted).

[6] *Chapa*, 212 S.W.3d at 311-12 (footnote omitted).

[7] *Id.* at 312 (citations omitted).

[8] *Id.* at 313 (footnote omitted).

[9] *Id.* at 313.

[10] *Chapa*, 212 S.W.3d at 314-314. In Justice O’Neill’s dissenting opinion, he concluded: “It is unclear to me, and the Court does not explain, how the legal services used to advance Chapa’s DTPA claim did not also advance her common-law fraud claim.” *Id.* at 320 (O’Neill, J. dissenting).

[11] *Id.* at 313.

[12] *Id.* at 314 (footnote and citations omitted).

[13] 526 S.W.3d at 427.

[14] See, e.g., *Page v. 3838 Oak Lawn Ave (TX) Owner, LLC*, No. 05-21-01150-CV, 2023 WL 3316746, at *7 (Tex. App.—Dallas May 9, 2023, no pet.) (mem. op.) (concluding no segregation required per defendant “because the facts were so intertwined that their proof relied on essentially the same facts.”); *1776 Energy Partners, LLC v. Marathon Oil EF, LLC*, 692 S.W.3d 564, 601 (Tex. App.—San Antonio 2023, no pet.) (“Marathon’s expert on attorney’s fees... concluded that ‘the same basic principles of the evidence’ would apply to Marathon’s defenses against both 1776’s breach of contract claims and its fraud claim.... Barger testified that he ‘did not pull out any percentage for fraud’ because he did ‘not see how [he] could possibly’ segregate the work.... Based on this record, we do not believe the trial court erred by concluding that Marathon’s fees could not be segregated.”) (citations omitted); *Turner v. Ewing*, 625 S.W.3d 510, 524–25 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (“A recognized exception to this duty to segregate arises when the attorney’s fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their ‘prosecution or defense entails proof or denial of essentially the same facts.’... Thus, Ewing Builders’ causes of action as well as the Turners’ counterclaims are so inextricably intertwined as to fall within the exception....” (citations omitted)); *Franklin D. Azar & Assocs., P.C. v. Bryant*, No. 417CV00418SDJKPJ, 2020 WL 6531938, at *9 (E.D. Tex. Oct. 2, 2020), adopted, No. 417CV00418SDJKPJ, 2020 WL 6504305 (E.D. Tex. Nov. 5, 2020) (finding “Plaintiff’s claims arise out of the same transaction and are so interrelated that their prosecution entails proof of the same facts.”) (citations omitted); *Texas Windstorm Ins. Ass’n v. James*, No. 13-17-00401-CV, 2020 WL 5051577, at *24–25 (Tex. App.—Corpus Christi-Edinburg Aug. 20, 2020, no pet.) (mem. op.) (“[A]ppellants argue the Jameses... failed to present evidence that the causes of action were so interrelated that their prosecution entailed proof of the same facts, which would negate the requirement to segregate.... Cashiola opined ‘that 5 percent is more than enough to remove from this fee to account for the common law cause of action.’...” (citations omitted)).

[15] See, e.g., RSS MSBAM2014C17-TX HAH, LLC v. Houston Airport Hosp. LP , No. 01-21-00042-CV, 2024 WL 3995434, at *26 (Tex. App.—Houston [1st Dist.] Aug. 30, 2024, no pet.) (mem. op.) (“Still, Harbor provided at least some evidence of the amount of fees it should be awarded. Its failure to segregate some unrecoverable attorney’s fees does not preclude a recovery of attorney’s fees. The appropriate remedy is to remand....” (citations omitted)); Donnelly v. Donnelly , No. 14-21-00592-CV, 2022 WL 7188634, at *14 (Tex. App.—Houston [14th Dist.] Oct. 13, 2022, no pet.) (mem. op.) (“While MacIntyre did not specifically identify unrecoverable fees that had not been segregated, he identified a percentage of time that could reasonably be attributable to recoverable fees,... Therefore, we remand this issue....” (citations omitted)); see also BMB Dining Servs. (Willowbrook), Inc. v. Willowbrook I Shopping Ctr. L.L.C. , No. 01-19-00306-CV, 2021 WL 2231258, at *15 (Tex. App.—Houston [1st Dist.] June 3, 2021, no pet.) (mem. op.) (“[W]hen a defendant asserts a counterclaim that the plaintiff must overcome in order to fully recover on its contract claim, the attorney’s fees necessary to defeat that counterclaim are likewise recoverable.” (citation omitted)); Quantum Plus, LLC v. Hospital Internists of Austin, P.A. , NO. 03-23-00263-CV, 2025 WL 420213, *12 (Tex. App.—Austin Feb. 7, 2025, no pet.) (mem. op.) (“The two claims are so interrelated that ‘prosecution or defense entail[ed] proof or denial of essentially the same facts.’...” (footnote and citations omitted)); Hagan v. Pennington , No. 05-18-00010-CV, 2019 WL 2521719, at *9 (Tex. App.—Dallas June 19, 2019, no pet.) (mem. op.) (“When a defendant alleges the same theory as both an affirmative defense and a counterclaim in order to reduce or eliminate the plaintiff’s recovery on a contract claim, the plaintiff does not need to segregate fees.”); In re Est. of Snow , No. 12-11-00055-CV, 2012 WL 3793273, at *14 (Tex. App.—Tyler Aug. 30, 2012, no pet.) (mem. op.) (“segregation based on separate theories of the same cause of action is not required.”).

[16] See, e.g., Eggemeyer v. Hughes , 621 S.W.3d 883, 899 (Tex. App.—El Paso 2021, no pet.) (noting neither expert testimony nor billing statements establish how to determine what fees should be segregated); Khoury v. Tomlinson , 518 S.W.3d 568, 580-81 (Tex. App.—Houston [1st Dist.] Mar. 30, 2017, no pet.) (rejecting attorneys’ testimony that “‘there’s... a rule that says if the facts of the case are so inextricably intertwined that it’s the same set of facts, the same nucleus of operative facts that gives rise to these claims,’ segregation is not necessary.”); Thunder Rose Enters., Inc. v. Kirk , No. 13-15-00431-CV, 2017 WL 2172468, at *15 (Tex. App.—Corpus Christi Apr. 20, 2017, pet. denied) (mem. op.) (holding affidavit insufficient because neither stated fees requested were attributable to any particular cause of action, nor stated that any particular services advanced both recoverable and unrecoverable claims); Win Shields Prods., Inc. v. Greer , No. 05-16-00274-CV, 2017 WL 2774443, at *7 (Tex. App.—Dallas June 27, 2017, pet. denied) (mem. op.) (rejecting expert testimony that “discrete legal services advance both a recoverable and unrecoverable claim” without any “explanation for how fees incurred researching and drafting pleadings on the fraudulent inducement claim, preparing jury questions on that claim, or researching and briefing [] affirmative defense to that claim”); Fix It Today, LLC v. Santander Consumer USA, Inc. , No. 02-14-00191-CV, 2015 WL 2169301, at *7 (Tex. App.—Fort Worth May 7, 2015, no pet.) (mem. op.) (holding affidavit, which stated that “the legal services are so intertwined that they need not be segregated”, was insufficient because some of claims for which fees were unrecoverable had different elements and required additional work); Contemporary Contractors, Inc. v. Centerpoint Apt. Ltd. P/S , No. 05-13-00614-CV, 2014 WL 3051321, at *7 (Tex. App.—Dallas July 3, 2014, no pet.) (mem. op.) (rejecting argument that reduction of attorneys’ hourly rate negates need to segregate recoverable from unrecoverable fees).

[17] Letter by Court of Appeals dated Mar. 25, 2025 at 2, No. 02-24-00321-CV (Tex. App.—Fort Worth) (set for submission with oral argument on April 8, 2025).

[18] See Durant v Sheridan, No. 02-24-00321-CV (Tex. App.—Fort Worth) Brief of Appellant at 44-63 (Dec. 16, 2024); Brief of Appellees at 62-80 (Feb. 18, 2025) (at 78, “In Maciejack, the Court recently held segregation was not required because all the claims and defenses ‘relied on exactly the same set of operative facts in order to answer the same question[.]’”); Reply Brief of Appellant at 27-37 (Mar. 17, 2025) (at 36, “Plaintiff’s counsel’s statement is based on the former ‘inextricably intertwined’ standard....”).

[19] Maciejack, 2024 WL 3195851, at *6. In a zoning/ordinance dispute between a property owner and the City, Appellants argued the trial court erred by not requiring segregation. While other issues were raised, they are beyond the scope of this article.

[20] See id. at *12.

[21] Petition for Review at 12, Maciejack v. City of Oak Point, No. 24-0783 (Tex. Oct. 23, 2024) (“Petition”).

[22] Id. at 24.

[23] Id. at 21; see also Reply to Respondent's Response to Petition at 5, *Maciejack v. City of Oak Point*, No. 24-0783 (Tex. Feb. 5, 2025) ("Reply").

[24] Reply at 6-7; see also Petition at 19 ("Even if the City's bases for recovering fees overlapped with its Chapter 54 claims, it still had to segregate unrecoverable tasks, such as drafting the City's Chapter 54 pleadings.").

[25] Reply at 11.

[26] City of Oak Point's Response to Petition, at 13, *Maciejack v. City of Oak Point*, No. 24-0783 (Tex. Jan. 6, 2025) ("Response").

[27] Response at 15.

[28] Response at 12.

[29] See, e.g., *BMB Dining Services*, 2021 WL 2231258, at *15, n.14 ("Although it was not required to do so, we note that Willowbrook's counsel specifically discounted the total intertwined fees by a percentage to account for any potential unrecoverable fees: 'The defense of the claims asserted by Defendants was inextricably intertwined with the issues associated with enforcing the contract, but since there may be some minor issues that do not overlap, I have allocated 5% of the attorney's fees as unrecoverable for this reason.'").

[30] See, e.g., *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757, 760 (Tex. 2012).

[31] See, e.g., *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 502 (Tex. 2019) ("Nevertheless, billing records are strongly encouraged to prove the reasonableness and necessity of requested fees when those elements are contested." (citations omitted)).

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