



# Insurance Coverage for Claimant's Attorneys' Fees

By:

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# Claimant's Attorneys' Fees Recovery

- Construction Defect Case against a contractor with a commercial general liability policy
- Plaintiff makes a demand for (1) cost of repair and (2) attorneys' fees and expert costs accrued in the lawsuit.
- Does the contractor's commercial general liability policy cover the *Plaintiff's* attorneys' fees and expert costs?

# Relevant Policy Provisions

## SUPPLEMENTARY PAYMENTS — COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

- . . .

a. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

# Relevant Policy Provisions

## 1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay *as damages because of* “bodily injury” or “property damage” to which this insurance applies.

(emphasis added)

# Relevant Policy Provisions



**Attorneys' fees or  
Attorneys' expenses  
taxed against the  
insured?**



**Damages the insured is  
obligated to pay  
“because of” property  
damage?**



# Are Attorneys' Fees Damages?

- *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)
  - The Texas Supreme Court was asked whether attorneys' fees were compensatory damages for purposes of an appeal bond
  - The Texas Supreme Court held that, as a general rule, attorneys' fees will not constitute damages under Texas law.
  - In coming to the decision, the court found guidance in the Legislature's distinction between attorney's fees and damages in Section 38.001.

# Are Attorneys' Fees Damages?

“In accordance with [the American rule], the Legislature specifically designates when attorney's fees may be recovered and, in doing so, distinguishes between fees and damages. Civil Practice and Remedies Code chapter 38, the primary statute governing such fees, allows a prevailing party to ‘recover reasonable attorney's fees... *in addition to* the amount of a valid claim and costs, if the claim is for... an oral or written contract’.”

*In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013)

# Are Attorneys' Fees Costs?

- Lower court ruled that “costs awarded in the judgment could include litigation costs, so attorney’s fees must be included in the supersedeas bond.
- Texas Supreme Court rejected and stated:  
*We disagree that “costs awarded in the judgment” includes anything other than what it ordinarily means: court costs.*

*In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168  
(Tex. 2013)

# Are Attorneys' Fees Costs?

- Supreme Court again looked to Sec. 38.001 that provides “a person may recover reasonable attorney’s fees . . .in addition to the amount of a valid claim and costs.”
- **HOLDING:** Attorney’s fees are neither compensatory damages nor costs for purposes of suspending enforcement of a money judgment.

*In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168  
(Tex. 2013)

# Attorneys' Fees as Damages: *Nalle*

Compensatory

Amount  
compensates party  
for the claim

Non-  
Compensatory

Amount  
compensates party  
for prevailing on  
the claim

# Are Attorneys' Fees Damages?

- *Mid-Continent Cas. Co. v. Castagna*, 410 S.W.3d 445, 463–64 (Tex. App.–Dallas 2013).
  - In this case, the Court upheld coverage for an arbitration award that included a fee award to the claimants
  - The insurer in *Castagna* does not appear to have argued that attorney's fees were not “damages” within the meaning of its policy or Texas law.
  - Decided in August 2013, only a few months after the May 2013 decision in *In re Nalle*

# MCC v. Petroleum Solutions, Inc.

- Petroleum Solutions Inc. (“PSI”) sued by end user of product for a fuel tank leak
- PSI sued a component part manufacturer for failure of the fuel storage system

## Section 82.002(a)

- Attorneys’ fees to indemnify an innocent seller of a product

## Section 82.002(g)

- Attorneys’ fees prosecuting claims against the manufacturer

*No. CV 4:09-0422, 2016 WL 5539895, at \*29 (S.D. Tex. Sept. 29, 2016), aff’d in part, rev’d in part and remanded, 917 F.3d 352 (5th Cir. 2019)*

# MCC v. Petroleum Solutions, Inc.

- An award of attorney's fees under Section 82.002(g) that were incurred in prosecuting the 82.002(a) claim, are not compensatory damages
- The court reasoned that these damages are “ancillary” to recovery on the substantive cause of action
- Section 82.002(g) is a “fee-shifting provision” for successful claims.
- For that reason, the Section 82.002(g) “fee-shifting provision” was not “*damages* because of ‘property damage’”

# MCC v. Petroleum Solutions, Inc.

- An award of attorney's fees under Section 82.002(a) is an award of compensatory damages because the section creates “an independent cause of action.”
- The court reasoned that Section 82.002(a) provides compensation for a “*loss* arising out of a products liability action.” and “loss” to include “court costs and other expenses, reasonable attorney fees, and any reasonable damages.”

# Practical Application: Mid-Continent v. Petroleum Solutions

## Compensatory Damages

- Attorneys' fees recoverable as part of an independent cause of action

## Non-Compensatory Damages

- Attorneys' fees as part of a "fee-shifting statute
- E.g., Chapter 38 Attorneys' Fees

# Are Attorneys' Fees Damages?

- *Am. Guarantee & Liability Insurance Co. v. United States Fire Insurance Co.*, 255 F. Supp. 3d 677, 682 (S.D. Tex. 2017).
  - County sues general contractor (“GC”) for alleged defects with a courthouse
  - County receives an arbitration award that includes recovery of attorneys’ fees
  - GC enters into settlements with subcontractors that did not specify what items were covered by settlements.
  - The excess carrier disputes whether, in light of the subcontractor settlements and items not covered—such as attorneys fees and pre-judgment interest—the general contractor reaches the excess layer.

# Are Attorneys' Fees Damages?

- *Am. Guarantee & Liability Insurance Co. v. United States Fire Insurance Co.*, 255 F. Supp. 3d 677, 682 (S.D. Tex. 2017).
  - The court decided that the attorneys' fee award was not covered.
  - In support of this position, there is a footnote to *In re Nalle*. The court further distinguishes *Mid-Continent v. Castagna*.
  - The court reasoned that the policies have supplemental payment provisions that designate prejudgment interest and costs taxed against the insured as supplemental payments that do not reduce the limits of insurance.

# Are Attorneys' Fees Damages?

- *Satterfield & Pontikes Construction, Inc. v. United States Fire Insurance Co.*, 898 F.3d 574, 576 (5th Cir. 2018).
  - Appeal from the same courthouse case
  - The Fifth Circuit states that the excess policy “did not cover attorneys’ fees or other legal costs.”
  - In the footnote, the court states that “these costs are not damages” and cites *In re Nalle*

# Anadarko Petroleum v. Houston Casualty

- Another case involving the Deepwater Horizon spill
- 150 million in attorneys' fees
- The insured had 25% interest in the well site
- The insurer claims they owe 25% of the attorneys' fees based on the Joint Venture provision.
- The Texas Supreme Court determined that the carrier owed 100% of the attorneys' fees.

# Anadarko Petroleum v. Houston Casualty

*Ultimate  
Net Loss*

- Defined as including . . . all ‘Defense Expenses’ in respect of such ‘Occurrence.’”

*Joint  
Venture  
Provision*

- Limited the carrier’s liability to the product of (a) the percentage interest of [the insured] in said Joint Venture

The court reasoned that “Ultimate Net Loss” specifically included defense costs and the general meaning of the word “liability” in the Joint Venture Provision did *not* include defense costs

# Anadarko Petroleum v. Houston Casualty

- The court reasoned that “liability insurance” generally covers “damage the insured does to others.”
- The court further noted, based on *In re Nalle*, that an insured's defense expenses are not “damages” a third party sustains and “claims.”
- “Even in the broader common, ordinary sense, ‘damages’ are “[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury,” and thus ‘attorney's fees are generally not damages, even if compensatory[.]’”

# Recent Statutory Developments

V.T.C.A., Civil Practice & Remedies Code § 38.0015

§ 38.0015. Recovery of Attorney's Fees as Compensatory Damages

Effective: September 1, 2021

Currentness

(a) A person may recover reasonable attorney's fees from an individual, corporation, or other entity from which recovery is permitted under [Section 38.001](#) as compensatory damages for breach of a construction contract as defined by [Section 130.001](#).

(b) This section may not be construed to create or imply a private cause of action or independent basis to recover attorney's fees.

## Credits

Added by Acts 2021, 87th Leg., ch. 1015 (H.B. 2416), § 1, eff. Sept. 1, 2021.

# Recent Statutory Developments

V.T.C.A., Civil Practice & Remedies Code § 130.001

§ 130.001. Definition

Effective: September 1, 2001

[Currentness](#)

In this chapter “construction contract” means a contract or agreement made and entered into by an owner, contractor, subcontractor, registered architect, licensed engineer, or supplier concerning the design, construction, alteration, repair, or maintenance of a building, structure, appurtenance, road, highway, bridge, dam, levee, or other improvement to or on real property, including moving, demolition, and excavation connected with the real property.

# Recent Statutory Developments

## BACKGROUND AND PURPOSE

The Texas Supreme Court has previously ruled that attorney's fees awarded to a prevailing party are considered costs and not damages under a commercial general liability insurance policy. It has been suggested that this ruling leaves contractors exposed, even in covered insurance claims, to potentially large awards for attorney's fees. In some cases, a contractor could have an otherwise covered case but still be forced to go to trial if the insurance carrier disagrees with the plaintiff's assessment of damages. If the plaintiff gets an award of attorney's fees, these costs will not be covered by the policy even if the rest of the damages are covered, which creates a sizeable gap in coverage. C.S.H.B. 2416 seeks to fill this coverage gap by authorizing a person to recover attorney's fees as compensatory damages for breach of a construction contract.

“The change in law made by this Act applies only to a cause of action that accrues on or after the effective date [Sept. 1, 2021] of this Act.”

Section 2 of Acts 2021, 87th Leg., ch. 1015 (H.B. 2416)

# Questions

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