Lawyers Argue Contingency-Fee Agreement Includes Share in Business

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A Bexar County jury found a contingency-fee contract did not provide San Antonio lawyers Tom Hall and Blake Dietzmann with a 22 percent interest in a water exploration company as part of their fee.

A 225th District Court jury returned a verdict on Oct. 16, finding defendant Dean Davenport of San Antonio—on behalf of himself and two companies he controls, Dillon Water Resources and 5D Drilling & Pump Service—did not agree in a fee agreement that attorney fees could include a 33.5 percent interest in two-thirds of Water Exploration Co. (WECO).

Defense attorney Alexander Kaplan, a partner in Susman Godfrey in Houston, says the verdict in *Tom Hall v. Dillon Water Resources* tells Texas lawyers that they need to be precise when writing contingency-fee agreements that include provisions for noncash payments.

"You have to make it crystal clear how your fee is calculated," says Harry Susman, another Susman Godfrey partner who also represents the defendants.

Kaplan says a number of Texas Supreme Court cases lay out special rules for noncash components in contingency-fee contracts.

"If a lawyer wants a contingent fee on a noncash consideration, the court has said the burden is on the lawyer to make it express," he says, citing *Levine v. Bayne, Snell & Krause* (2001). In that case, the Supreme Court declined to construe a contingency-fee contract as entitling an attorney to compensation exceeding the client's recovery.

In this case, Kaplan says, "[I]t's very clear the contract applies to only the cash recovery and doesn't give the lawyers an interest in the noncash."

Plaintiffs' attorney Ricardo Cedillo, a partner in Davis, Cedillo & Mendoza of San Antonio, did not return two telephone messages seeking comment. Hall, of Thomas C. Hall PC, and Dietzmann, a solo practitioner, each did not return a telephone message.

Water Fight

In 2012, Hall and his firm, formerly known as Hall & Bates, and Dietzmann filed *Tom Hall v. Dillon Water Resources* against Davenport, Dillon Water Resources—the company that held Davenport's original ownership interest in WECO—and related companies.

As alleged in the petition, Davenport and partners James Allen and Mark Wynne formed WECO in 1999 to find, drill for and produce commercial drinking water in Texas. Each owned a third of WECO, and the final 1 percent was owned by a joint partnership called WAD. Because the relationship between the partners became "strained" over time, Davenport, Dillon and 5D hired Dietzmann and Hall in March 2008 in an underlying suit to litigate against Allen and Wynne. Davenport hired lawyer Tim Patton in August 2008 to assist.

"If a lawyer wants a contingent fee on a noncash consideration, the court has said the burden is on the lawyer to make it express," says defense attorney Alexander Kaplan.

Hall, his firm and Dietzmann note in a footnote in the petition that Patton and his firm, Timothy Patton PC, were plaintiffs in the 2012 suit, but "settled out." Patton did not return a telephone message seeking comment. Susman says terms of the settlement are confidential.

In January 2009, Hall, his firm and Dietzmann allege, a jury in the underlying case found that Allen and Wynne converted Davenport's interest in WECO, which was valued at $70 million. Davenport and his companies settled separately with Allen and Wynne. In the settlements, Davenport received cash from Allen, according to the petition, and full ownership in WECO from Allen and Wynne.

Glenn Deadman, a solo practitioner in San Antonio who represented Allen and Wynne at trial, declines comment.

The plaintiffs allege Davenport paid the attorneys nearly $100,000 after the settlement and in December 2009 paid another $114,569 to Patton and $297,813 to Hall & Bates but that Davenport later also should have paid the lawyers with an interest in WECO.

What's Included?

The terms of the contingency-fee contracts the defendants signed with their lawyers is at issue in *Hall v. Dillon*.

"[T]he contingency fee contracts for Hall, Dietzmann, and Patton…convey a total 46.5 % contingent fee interest. Both contracts provide that Plaintiffs would be entitled to designated percentages of the gross amount recovered," the plaintiffs allege in the petition.

They allege that numerous times after the Allen settlement, "Davenport confirmed to Plaintiffs that they owned interests in WECO under their contracts and that settlement."

However, the plaintiffs allege in the petition that the defendants breached their contracts with the plaintiffs by "refusing to pay Plaintiffs based on their ownership interests."

The plaintiffs brought these causes of action against the defendants: breach of contract; ratification; quasi-estoppel; conversion; breach of fiduciary duty and request for constructive trust; oppression and freezing out; conspiracy; vice-principal and officer/manager misconduct; necessity for lis pendens; and malice, fraud and exemplary damages. They also alleged the defendants violated the fraudulent transfer act.

In their third amended answer, filed on Sept. 16, the defendants denied the allegations. Among many affirmative defenses, they asserted the doctrine of waiver and the doctrines of ratification and/or modifications, and they alleged the claims are barred because the "contingent fee agreements at issue are void as against public policy."

In an 11-1 verdict ending a trial that began on Sept. 23, the jury found that Davenport failed to comply with the fee agreement in connection with expenses and should pay the plaintiffs $226,795 for "reasonably necessary expenses incurred in the prosecution of the Allen/Wynne Lawsuit."

However, the jury found Davenport, Dillon, 5D, WAD and WECO each did not commit fraud by misrepresentation or fraud by concealment. The jury found Hall, Thomas C. Hall PC and Dietzmann are estopped from seeking an ownership interest in WAD and WECO, and waived their right to seeking that interest.

The jury found Davenport, Dillon and 5D did have an attorney-client relationship with Hall, Thomas C. Hall PC and Dietzmann. The jury found Hall, the firm and Dietzmann complied with their fiduciary duties to the defendants when entering into the fee agreement and afterward.

According to the defense team, the plaintiffs asked jurors to award $24.6 million in actual damages and $18 million in punitive damages.

Susman says more than half of the revenue coming into his firm stems from contingency-fee work, and the firm has a standard provision in its contracts that deals with noncash compensation.

"We provide for this just as a matter of course, because you never know what will happen," Susman says.

And what kind of a fee agreement did Susman Godfrey have for *Hall v. Dillon Water Resources?*

"Hourly," Susman says.

"It was what worked best for the client," he says. TL