

The image features a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text "Texas Supreme Court Update" is written in a large, white, serif font, and "Opinions Issued June 7, 2019" is written in a smaller, white, italicized serif font below it.

Texas Supreme Court Update *Opinions Issued June 7, 2019*

By Stephen Gibson¹

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Damages Under the [Texas Sales Representative Act](#): Commissions must be unpaid before the case is decided for the plaintiff to have any “damages” that can be trebled under the statute. However, costs and attorney’s fees may be recovered if there are commissions unpaid after they were due under the sales representative’s contract.

Under the Texas Sales Representative Act (“TSRA”), failure to timely pay a commission as the Act requires is liable to the sales representative for three times the commissions due plus reasonable attorney’s fees and costs. [Tex. Bus. & Comm. Code § 54.004](#). In *JCB, Inc. v. Horsburgh & Scott Co.*, the principal failed to comply with its contract concerning timing of payment and the amount of the commissions due.

The contract was terminated, but the principal told the sales representative that it could either accept further delays in payment or a reduction in the amount of the agreed-upon commissions due. The representative’s federal court suit was resolved in its favor on summary judgment. The parties did not dispute the existence of the commissions contract or that the principal failed to comply with it. All the disputed commissions were unpaid and due on the date of breach, some were unpaid and due when the representative filed suit, and none were unpaid when the district court rendered summary judgment.

The principal appealed to the Fifth Circuit, which certified the following questions:

- (1) What timing standard should courts use to determine the existence and amount of any “unpaid commissions due” under the treble damages provision of ... § 54.004(1)?
- (2) May a plaintiff recover reasonable attorney’s fees and costs under ... §54.004(2), if the plaintiff does not receive ... treble damages ..., and under what conditions?

So that it could calculate the amount subject to trebling, the Fifth Circuit wanted to know by the response to the first question whether the due date for the commissions was the: a) due date under the original commissions contract; b) the date the representative filed suit; or c) the date of judgment. If the last of these interpretations was correct, there would have been no unpaid commission due that could have been subject to trebling.

1. *Under §54.004, the commission must be unpaid when the case is decided for there to be any amount that is subject to trebling.*

The Fifth Circuit’s panel was divided with Judge Duncan taking the view that whether commissions were unpaid was governed by the contractual due date. If the commissions were paid after that date, the representative was entitled to trebling even if those commissions had been paid later. Judge Ho, on the other hand, noted that the Act omitted any reference to a specific time for identifying the due date for the commissions. Ordinarily, damages are calculated as of

¹ The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

the time of trial. Moreover, Texas's punitive damages statute did not allow punitive damages unless actual damages were recovered.

The Texas Supreme Court, in a unanimous opinion by Justice Blacklock, rejected the idea that other sections of the TSRA shed any light on the timing question for purposes of recovering treble damages. Instead, referencing the maxim that the Legislature presumably knows and acted consistently with extant law when it passed the statute, the court relied on the proposition that damages are calculated in breach of contract cases when the case is submitted to the trier of fact. Measuring damages at the time of the breach was deemed unworkable because it would circumvent a plaintiff's obligation to mitigate and provides no incentive for the defendant to pay amounts owed to avoid or narrow the necessity of litigation.

The court analogized to the DTPA and observed that under it (a) the plaintiff must have actual damages to have anything to treble and (b) those actual damage amounts were still subject to reduction by the duty to mitigate or reduction by a defendant's payments. The court, therefore, rejected the representative's contention that the TSRA measured the existence of damages before the verdict because doing so would adopt a statutory interpretation that was "foreign to the way civil litigation normally operates." Under the opinion, because all commissions had been paid before the summary judgment was decided, the principal could not be liable for unpaid commissions and, therefore, there was nothing to treble.

The court was unmoved by arguments that its interpretation made the TSRA meaningless because the threat of treble damages – what the opinion characterizes as a "heavy stick" – encouraged payment of the commissions due. Note to Legislature: if you want something other than what's customary and usual, you *must* spell it out.

2. *Attorney's fees and costs, on the other hand, are recoverable regardless of whether the representative recovers treble damages.*

For purposes of recovering attorney's fees and costs under §54.004, the court reached the opposite conclusion. Its reasoning, with one significant exception, was based on the text of the same the same statutory language that a "principal who fails to comply with a provision of a contract" is liable for treble damages and reasonable attorney's fees and costs. For the latter, the opinion was simple and straightforward:

Under the plain language of [§]54.004, a principal who "fails to comply with a provision of a contract under [§]54.002" is liable for the sales representative's reasonable attorney's fees. [The principal] failed to comply with the parties' agreement when it did not pay nearly \$280,000 in commissions when due. As a result, [the representative] is liable for JCB's reasonable attorney's fees. That ends the inquiry.

So why does the breach of contract suffice for the recovery of attorney's fees and costs, but not treble damages? Apparently, the key is in the Legislature's use of the word "damages" instead of something like "unpaid commissions." As discussed above, the opinion assumed that by using the word "damages" the Legislature intended to import the common law's timing for valuation of damages: when the case is decided. "Attorney's fees" and "costs" carry no such common law baggage.

The court also rejected the argument that, without recovery of any damages under §54.004 –i.e., treble damages, the representative could not be considered the prevailing party. According to the principal, being a prevailing party is a necessary condition to an attorney's fee being reasonable. The opinion points out that being a "prevailing party" was an explicit requirement of the statute or contract in cases where that requirement was imposed. The TSRA imposed no explicit "prevailing party" requirement and the opinion "decline[d] to imply one." The opinion acknowledged that an attorney's fee cannot be reasonable if incurred solely in pursuit of a legally invalid theory. However, the opinion pointed to the incidental benefit of the suit to save the attorney's fee award: it compelled the principal to pay the agent's attorney's fees before the factfinder decided the case.

That analysis seems reasonable enough. However, the opinion ignores that the court implicitly approved diametrically opposed reasoning by denying review in *Elness Swenson Graham Architects, Inc. v. RLJ II-C Austin Air, LP*, 520 S.W.3d 145, 170 (Tex. App. – Austin 2018, pet. denied)(opinion on rehearing). In *Elness*, the court of appeals imposed a "prevailing party" requirement to deny attorney's fees under Texas Civil Practice & Remedies Code §38.001 to deny attorney's fees whose breach-of-contract recovery was wiped out by settlement credits. The current version of §38.01

only requires that the fees be incurred in pursuit of a valid claim, which the *Elness* plaintiff established. Moreover, the predecessor of §38.01 had long ago been amended to delete the requirement that the person seeking attorney's fees must recover judgment. Had the court applied the same analysis to *Elness* as it did in *JCB*, it would have upheld the attorney's fee award because the pursuit of the litigation resulted in the settlements by other parties to the plaintiff's benefit.

Although there is no logical rationale for the opposite interpretations afforded §54.004 and §38.01, it appears the latter requires the claimant to be a prevailing party in the litigation, but the former does not. The *JCB* opinion does not decide whether attorney's fees incurred *after* the principal paid the commissions were also reasonable and, therefore, recoverable.

In the end, the representative recovered nothing other than its reasonable attorney's fees and costs.

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