

# IN THE SUPREME COURT OF TEXAS

---

---

No. 99-0981

---

---

RON LEVINE AND SERENA LEVINE, PETITIONERS

v.

BAYNE, SNELL & KRAUSE, LTD., RESPONDENT

---

---

ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

---

---

**Argued on April 12, 2000**

JUSTICE OWEN, concurring.

I concur in the judgment in this case, but the Court's opinion is overly broad. The term "any amount received" is unambiguous and connotes a dollar amount received by the client rather than a non-cash recovery. But not all counterclaims or setoffs should diminish an attorney's contingent fee that is based on a percentage of "any amount received." In some situations, an attorney should be able to assert a claim against a client for misrepresentation or breach of an express or implied contractual covenant and thereby recover a fee based on the amount awarded for the client's affirmative claims without any reduction for offsets. In this case, if the Levines had been directed by their counsel to continue payments on their mortgage, had been fully apprised of the consequences of nonpayment, and had then stopped paying their mortgage, the outcome in this case should be different. And in other cases, if a client takes action after a fee agreement is consummated that would not be reasonably anticipated by counsel, and that action gives rise to a counterclaim, the attorney's contingent fee should not be diminished. Accordingly, although I agree with the Court that the Levines are entitled to judgment in their favor, I cannot join the Court's expansive statements about the respective rights and obligations in the attorney-client relationship.

## I

The Court relies on certain passages of the Restatement (Third) of The Law Governing Lawyers, but I respectfully submit that the Court has not explained fully the Restatement's overall view of the matter of fees in an attorney-client relationship. Under some circumstances, a lawyer should be entitled to a contingent fee based on the amount awarded for a successful claim without any adjustment or credit for a counterclaim or offset that reduces the amount of the judgment.

I agree that, generally speaking, a contingent fee agreement that provides for a percentage of "recovery" means that "the lawyer is entitled to receive the specified fee only when and to the extent the client receives payment," and "[i]n the absence of prior agreement to the contrary, the amount of the client's recovery is computed net of any offset, such as a recovery by an opposing party on a counterclaim." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35(2) cmt. d (2000); *id.* § 35(2). However, there are several other important principles set forth in the Restatement that bear on what an attorney's fee should be when there is a counterclaim.

First, "[a] tribunal should construe an agreement between client and lawyer as a reasonable person in the circumstances of the client would have construed it." *Id.* § 18(2). A corollary of that principle is that "[t]o determine what events client and lawyer contemplated, their contract must be construed in light of its goals and circumstances and in light of the possibilities discussed with the client." *Id.* § 34 cmt. c. The lawyer has a duty to "explain the basis and rate of the fee . . . and advise the client of such matters as conflicts of interest, the scope of the representation, and the agreement's implications for the client." *Id.* § 18 cmt. c. It is the lawyer who "bears the burden of ensuring that the agreement states any terms diverging from a reasonable client's expectations." *Id.* § 18 cmt. h. But the client also has obligations to its counsel. There may be consequences if a client "lies to a lawyer or fails to honor an expressed or implied provision of a client-lawyer agreement requiring cooperation with the lawyer." *Id.* § 17 cmt. d.

In light of these principles, the Court misses the mark in holding that unless a fee agreement specifically addresses counterclaims or offsets, a lawyer's contingent fee should always be reduced by a counterclaim. Whether a contingent fee should be based on a client's net or gross recovery

should depend on when the facts that give rise to a counterclaim come into existence, the degree to which a counterclaim is related to a client's claim, and the client's forthrightness with its counsel.

A few examples will hopefully illustrate the point that I wish to make. Suppose that a client engages an attorney to sue for negligence in connection with an auto accident. After the client has consulted with counsel and has agreed to pay a contingent fee of one-third of "any amount received," the client has an argument with the defendant-driver he has sued and physically assaults her. She asserts a counterclaim for her injuries. Under those circumstances, the client should be required to pay a contingent fee based on the amount he recovers for the defendant's negligence without regard to any amounts the defendant recovers on her counterclaim for assault. The client would have breached an implied covenant not to destroy or diminish the value of the subject matter of the contract, which under my example is the value of the negligence claim. The lawyer had no obligation to explain to the client at the time the fee agreement was negotiated that if the client physically assaults the defendant, the contingent fee would be based on the amount awarded for the negligence claim without any reduction for an assault counterclaim. A reasonable client would not expect that the lawyer's fee would be diminished under these circumstances.

But a slight change in the facts may make a difference. Suppose that the client had assaulted the defendant before he retained counsel. Under the Restatement's rationale, the lawyer probably has an obligation to conduct due diligence to determine if the prior dealings the client has had with the defendant provide any basis for counterclaims. If the client is forthright and discloses all material facts, then the lawyer and the client should expect that "any amount received" may be reduced by a counterclaim. It would then be incumbent on the lawyer to obtain an express provision in the fee agreement that the contingency fee would not be reduced by counterclaims or offsets. If, however, the client failed to disclose material facts in response to inquiries by the lawyer, the outcome should be different. If, in response to the lawyer's questions, the client conceals information or makes misrepresentations, the lawyer would have a cause of action based on fraud in the inducement and should be able to receive a fee based on the amount the client recovered for the claim he hired the lawyer to pursue, without regard to counterclaims.

I turn to the facts in this case.

## II

The Levines retained Barry Snell's firm to sue the Smiths for defects in the foundation of the home that the Smiths had sold to the Levines. The Levines' fee agreement provided that the Snell firm would be paid one-third of "any amount received by settlement or recovery and to receive such payments, Client assigns to attorney a 33-1/3% (1/3) undivided interest in his cause of action." The term "any amount received by settlement or recovery" is unambiguous, as both the trial court and the court of appeals held. It means any dollar amount received by the Levines.

The dollar amount that the Levines would otherwise have received from their claims against the Smiths was reduced by a counterclaim that was a direct result of advice from their counsel. Ron Levine testified without contradiction that Barry Snell told him to stop making mortgage payments to the Smiths. Levine could not remember if that instruction was given before or after the contingent fee agreement was signed on March 3. He did recall that he made the March mortgage payment, but none thereafter. But regardless of precisely when Snell told Ron Levine to stop making mortgage payments, Snell is presumed to have known that cessation of payment could well lead to acceleration of the Levines' note and a counterclaim by the Smiths for the full amount that the Levines owed. Snell did not obtain an express agreement from the Levines that attorney's fees would be based on the amount awarded for the Levines' affirmative claims without any reduction for a counterclaim, even though Snell should have anticipated a counterclaim.

As detailed by the Court, because of nonpayment, the Smiths did in fact accelerate the note that was secured by the mortgage and assert a counterclaim. Both the Levines and the Smiths prevailed on their respective claims. In arriving at the judgment that was to be rendered, the trial court deducted the amount awarded to the Smiths from the amount awarded to the Levines. The Smiths paid that net amount to the Levines, and the Levines tendered it to Snell's firm. The amount of attorney's fees that the Levines paid was thus more than one-third of their net recovery. It was all of their net recovery. Snell's firm later sued the Levines for additional attorney's fees based on the Levines' gross, rather than net, recovery. The firm filed a motion for summary judgment, and the Levines filed a cross-motion for summary judgment.

The general rule that, absent a prior agreement to the contrary, contingent fees are to be computed net of any offsets or credits, is the starting point in determining what was owed to the Snell firm. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35(2) cmt. d. In order to withstand summary judgment for the Levines, it was incumbent on the Snell firm to assert facts that would entitle it to recover a fee based on the Levines' gross, rather than net, recovery. It did not do so. The Snell firm did not assert that it had advised the Levines to continue to pay their mortgage, of the consequences if the Levines defaulted, and that the Levines stopped paying in disregard of that advice. The Snell firm simply asserted that its fee agreement applied to the gross recovery it obtained for its client. Under these circumstances, the Levines were entitled to summary judgment that the Snell firm was not owed any additional sums.

I recognize that in this case, there is a strong equitable argument that the counterclaims against the Levines did not really diminish their recovery because they paid no more to the Smiths than was owed under a promissory note, and the Levines received the title to their home free and clear of any indebtedness. However, on balance, it seems that a reasonable person in the Levines' shoes would view one-third of "any amount received" to mean money that they were able to put in their pockets, not one-third of non-cash value that they received as a result of the suit. Suppose that the Levines' judgment against the Smiths had equaled the Smiths' judgment against the Levines (\$161,851.38), and there was no net recovery for the Levines. A reasonable person in the Levines' shoes would not expect that they would have to find a means of paying their counsel over \$53,000 in cash. Paying such an amount may have been difficult, if not impossible, for some homeowners without selling their home. At the time the Levines' suit against the Smiths was concluded, homeowners could not use their homestead as collateral unless the loan was for purchase money or improvements on the homestead. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 660 (Tex. 1996) (construing former TEX. CONST. art. XVI, § 50, prior to the 1998 amendment). If "any amount received" included extinguishment of a mortgage, clients like the Levines could be placed in an untenable position by agreeing to pay their attorney one-third of any amount received and then following their attorney's advice to default on their mortgage.

I am persuaded that when a contingent fee agreement uses the term “any amount received,” that term should be given its ordinarily-understood meaning, which is that the fee will be based on dollar amounts received. In the absence of facts that would give rise to a cause of action against a client for fraud in inducing the contingent fee agreement or breach of an express or implied covenant to cooperate in the prosecution of the claim, the fee agreement should limit counsel’s recovery to one-third of the net cash amount recovered by the client.

As the Court points out, the Levines do not seek to recover overpayments they made to the Snell firm. Accordingly, although I am not in complete accord with the Court’s rationale, I agree with the Court that the judgment in this case should be a take-nothing judgment in favor of the Levines.

### III

In addition to my concern about some of the Court’s categorical statements regarding the circumstances under which counterclaims can reduce a contingent fee, it seems that there is some tension between the Court’s reasoning in this case and our recent holding in *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000). In *Lopez*, the parties’ fee agreement provided that if the case were “appealed to a higher court,” the contingent fee would increase by an additional five percent. The plaintiffs prevailed at trial, and while settlement negotiations were pending, the defendant filed a cash deposit in lieu of a bond to ensure that its appeal would be timely if negotiations were not fruitful. A few days later, the case settled, and the defendant paid the plaintiffs a large sum. The plaintiffs’ counsel demanded the additional five percent under the contingency agreement. This Court held that the case had been appealed and that the lawyers did not breach their contract or a fiduciary duty by charging the additional five percent. However, the three justices who decided the case in the court of appeals had concluded that when a case is “appealed to a higher court” was susceptible to more than one reasonable meaning. *See Lopez v. Muoz, Hockema & Reed, L.L.P.*, 980 S.W.2d 738, 741 (Tex. App.—San Antonio 1998) (holding that “[w]hatever ‘appealed to a higher court’ means, it means more than filing a cash deposit in lieu of a cost bond, and that is all that occurred here.”)

The Court's decision today could be misread to mean that if *Lopez* were before the Court now, the lawyers in *Lopez* would have been obligated to alleviate any confusion about what "appealed to a higher court" meant when they first entered into the contingency fee agreement, even though this Court held in *Lopez* that the fee agreement was unambiguous. *See Lopez*, 22 S.W.3d at 860. I do not think that the Court intends such a result by virtue of its decision in this case, and I would make it clear that a lawyer should not have to forfeit all or part of a fee for failure to clarify what an unambiguous agreement means. An unambiguous fee agreement between a client and its counsel should be given effect as written. But as I have said above, this does not foreclose claims that a lawyer may assert against a client for misrepresentation in inducing the fee agreement or breach of an express or implied covenant not to destroy or diminish the value of the contract.

#### IV

Because of the disposition of this case, an important issue is not before the Court. But it bears mention. The Levines' fee agreement provided that in addition to the one-third contingency fee, they were obligated to pay the Snell firm any amounts awarded by the court as attorney's fees. The agreement said, "[a]ny attorneys fees awarded by any court shall go to my [the Levines'] attorneys in addition to the above percentages of recovery."

The Restatement concludes in section 38 that "[a]n agreement providing that a lawyer is to receive both a standard contractual fee award and a fee awarded by a court, without crediting the award against the contractual fee, is presumptively unreasonable." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 38 cmt. f. Lawyers who have these types of agreements should beware, if not forewarned.

\* \* \* \* \*

I join in the Court's judgment, but for the foregoing reasons, I do not join in its opinion.

---

Priscilla R. Owen  
Justice

OPINION DELIVERED: February 1, 2001