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Texas Supreme Court Holds Attorney's Fees are Not Recoverable Under the Texas Construction Trust Fund Act.

By [Courtney Lynch](#)

In an opinion delivered last week, the Texas Supreme Court held that attorney's fees are not recoverable under the Texas Construction Trust Fund Act. *Dudley Construction, Ltd. v. ACT Pipe and Supply, Inc.*, No. 16-0651 (Tex. April 6, 2018).

The Texas Construction Trust Fund Act ("the Act"), located in Chapter 162 of the Texas Property Code, has long provided protection to Subcontractors and Suppliers who have not received construction payments rightfully due to them. Under the Act, it was the intent of the Texas Legislature that disbursements from an Owner to a Contractor were to be held in trust for parties down the payment chain, such as Subcontractors and Suppliers.

Prior to last week's Supreme Court ruling, lower courts occasionally and inconsistently allowed for the recovery of attorney's fees under the Act where a claim was "for work performed or materials supplied." *Perry & Perry Builders, Inc. v. Galvan*, No. 03-02-00091-CV, 2003 WL 21705248, *8 (Tex. App.—Austin July 24, 2003, no pet.) (mem. op.)).

Under Texas law, the recovery of attorney's fees is only allowed where explicitly authorized by statute or contract. Here, the Act defines trust funds, the Act defines when those funds are misapplied, and the Act provides for penalties. As the Court pointed out, "Without question, [the Act] says nothing about attorney's fees." *Dudley Construction, Ltd.*, at *14. In reaching its holding, the Court reasoned, "The legislature could have provided for attorney's fees in this scheme. It did not. So neither will we." *Id.* at *16.

So what does this mean to the Subcontractors and Suppliers for whom the Act is intended to protect? Subcontractors should take this holding as a reminder to properly notice and perfect lien rights against up-line Contractors and Owners. Texas mechanic and materialman lien laws expressly provide for the recovery of reasonable and necessary attorney's fees, but proper notice and timely filing is the first step to that potential recovery.