United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

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Lyle W. Cayce
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No. 21-50616

In the Matter of: Little River Healthcare Holdings, L.L.C.; Compass Pointe Holdings, L.L.C.; Timberlands Healthcare, L.L.C.; King's Daughters Pharmacy, L.L.C.; Rockdale Backhawk, L.L.C.; Little River Healthcare Physicians, L.L.C.; Cantera Way Ventures, L.L.C.; Little River Healthcare Management, L.L.C.,

Debtors,

Law Office of Ryan Downton,

Appellant/Cross-Appellee,

versus

Little River Healthcare Holdings, L.L.C.; Compass Pointe Holdings, L.L.C.; Timberlands Healthcare, L.L.C.; King's Daughters Pharmacy, L.L.C.; Rockdale Backhawk, L.L.C.; Little River Healthcare Physicians, L.L.C.; Cantera Way Ventures, L.L.C.; Little River Healthcare Management, L.L.C.,

Appellees,

James Studensky,

Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:20-CV-715

Before KING, JONES, and DUNCAN, *Circuit Judges*.

PER CURIAM:*

Appellee Little River Healthcare Holdings, L.L.C., contracted with the appellant, the Law Office of Ryan Downton, to represent it in an arbitration. That contract paid Downton a contingency fee based on whether the arbitrator awarded Little River consequential damages. Now, Downton appeals the judgment of the district court denying him certain contingent attorney's fees. Little River cross-appeals the contingent fees the court did award. For the following reasons, the district court's judgment is affirmed in part and reversed in part.

I.

Little River Healthcare Holdings, L.L.C. ("Little River"), engaged the Law Office of Ryan Downton ("Downton") to represent it in an arbitration against Blue Cross Blue Shield of Texas ("BCBSTX"). That arbitration involved breach-of-contract and Texas state-law claims against BCBSTX after the insurer failed to pay Little River various laboratory fees submitted by Little River for BCBSTX insureds. While the arbitration was ongoing, Little River entered into Chapter 7 bankruptcy and amended its fee arrangement with Downton. The new fee arrangement, which the bankruptcy court approved, provided Downton with a discounted hourly rate and the following contingency fee:

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

> [A] Contingency Fee equal to 10% of any award for consequential and/or punitive damages up to $300,000,000 . . . . For the avoidance of any ambiguity, consequential and/or punitive damages in the Arbitration are all damages other than direct damages (money that the Arbitrator finds BCBSTX should have paid Little River for healthcare services provided to BCBSTX insureds).

On May 6, 2020, the arbitrator issued the Final Award in Arbitration. She concluded that "Little River was directly damaged by BCBSTX's failure to pay for laboratory claims that were appropriately billed by Little River pursuant to the Contracts and applicable law." She broke down these damages into two figures: first, $47,755,000 for "the total BCBSTX payment shortfall attributable to totally or partially denied claims"; and second, $17,348,000 in "patient-responsibility" payments. The arbitrator explained that patient-responsibility payments "refer[] to co-insurance, deductible amounts and non-covered services that the subscriber, rather than BCBSTX, is responsible for paying." Because BCBSTX did not timely finalize claims between it and Little River, Little River was unable to collect the patient-responsibility amounts from BCBSTX-insured patients within its contract-mandated collection period.

Next, the arbitrator found that BCBSTX violated Texas's prompt-payment laws and, under that statutory scheme, owed $18,900,000 in penalties. The statute further clarified that half of such penalties were to be paid to the Texas Department of Insurance rather than Little River directly. Thus, BCBSTX would pay $9,450,000 to Little River and $9,450,000 to the Texas Department of Insurance.

Finally, the arbitrator found that BCBSTX owed Little River prejudgment interest on these damages. Under Texas law, interest can take the form of "interest as damages" or "interest as interest." She concluded that Little River was not entitled to "interest as damages" because Little

River could not point to any "specific indebtedness that Little River was forced to incur to cover for BCBSTX's default." That said, the arbitrator found that Little River was entitled to "interest as interest." This interest amounted to $14,866,685.

Little River's arbitration did not resolve totally in its favor, however, as the arbitrator rejected Little River's claim for $371,300,000 in "consequential damages" based on its lost enterprise value. Little River had argued that it was forced into bankruptcy because of BCBSTX's failure to pay it. But the arbitrator found that "Little River's cash-flow position . . . is in itself insufficient to show that BCBSTX was the proximate cause of Little River's liquidity crisis or that . . . BCBSTX could reasonably have anticipated that if it improperly adjudicated Little River's . . . claims the destruction of Little River's entire enterprise would be the probable result."

Because Texas law allows for a prevailing party of breach-of-contract and prompt-payment actions to recover attorney's fees, the arbitrator also had to determine which of Downton's fees could be shifted to BCBSTX. Little River requested a contingent-fee award from BCBSTX equal to $6,914,490 (10% of the sum of the patient-responsibility payments, prejudgment interest, and prompt-payment penalties). The arbitrator did not adopt that method, but instead performed her own lodestar calculation based on the hours Downton worked. She then ordered that BCBSTX pay Downton fees of "$2,154,875.80, which includes the reduced hourly ($481,761.30) and contingent fee ($1,673,114.50) components."

Importantly, the arbitrator made clear that she was not, and legally could not, rely on the contingency-fee arrangement between Downton and Little River to determine what fees were owed to Downton. She explained that it was the bankruptcy court's responsibility to determine Downton's "reasonable and necessary compensation for representation of the estate,

and the amounts it determines Little River is entitled to recover out of the estate's assets" and that such responsibility had "no bearing on what fees may be shifted to BCBSTX as a result of the award in this case." The arbitrator further stated that "the contingency fee arrangement between the bankruptcy Trustee and Mr. Downton is not determinative of reasonableness for purposes of shifting fees," and that "the Bankruptcy Court . . . will ultimately decide what amounts Little River may be entitled to recover out of the estate's assets. But under established Texas law, that decision has no bearing on what amount BCBSTX should pay as a fee award."

The following month, on June 12, 2020, Downton applied for attorney's fees in the bankruptcy court. Downton sought 10% of the patient-responsibility payments, the prompt-payment penalties, and the prejudgment interest, arguing that each was a consequential damage from which he could recover under the fee agreement. The bankruptcy court orally ruled on Downton's motion on July 28, 2020. The court found that Downton could not recover a portion of the patient-responsibility payments because they were "payments . . . that Little River billed to insurers which Blue Cross was found to have improperly denied. So I think that's out of the fee agreement. That would be a direct—direct damages." It also found that Downton was not entitled to a contingency fee for the prompt-payment penalties because "that is not damages, that is just a statutory penalty." That said, the bankruptcy court found that Downton was entitled to 10% of the prejudgment interest, because, contrary to the arbitrator's conclusion, the prejudgment interest was "interest as damages" rather than "interest as interest."

Downton appealed to the District Court for the Western District of Texas, which summarily affirmed the bankruptcy court's order. On August 30, 2021, Downton appealed, first arguing that the courts incorrectly categorized both the prompt-payment penalties and patient-responsibility

payments and second arguing that various doctrines of estoppel prohibit Little River from attempting to limit Downton's fees now. On October 13, 2021, Little River cross-appealed, arguing that the bankruptcy court was collaterally estopped from recharacterizing the prejudgment interest as "interest as damages."

II.

Whether Downton can recover a contingent fee depends on whether the particular arbitration award is direct damages or consequential damages under the fee agreement between Downton and Little River. We first assess the patient-responsibility payments, then the prompt-payment penalties, and last the prejudgment interest.

A. Standard of Review

This court reviews "the decision of a district court sitting as an appellate court in a bankruptcy case by applying the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied by the district court." *Viegelahn v. Lopez (In re Lopez)*, 897 F.3d 663, 668 (5th Cir. 2018) (quoting *Endeavor Energy Res., L.P. v. Heritage Consol., L.L.C. (In re Heritage Consol., L.L.C.)*, 765 F.3d 507, 510 (5th Cir. 2014)). While the award of attorney's fees is generally reviewed for an abuse of discretion, "legal conclusions underlying a determination of attorney's fees are reviewed *de novo*." *McBride v. Riley (In re Riley)*, 923 F.3d 433, 437 (5th Cir. 2019). The court's factual findings are reviewed for clear error. *Lopez*, 897 F.3d at 668. An appellate court will reverse the bankruptcy court's factual findings only if "left with the definite and firm conviction that a mistake has been made." *Id.* at 672 (quoting *Templeton v. O'Cheskey (In re Am. Hous. Found.)*, 785 F.3d 143, 152 (5th Cir. 2015)).

B. Patient-Responsibility Payments

Downton argues that the term "direct damages" is not defined by its recognized definition in case law but by the parenthetical in the fee agreement. That parenthetical provides: "money that the Arbitrator finds BCBSTX should have paid Little River for healthcare services provided to BCBSTX insureds." Since the patient-responsibility payments were not payments that BCBSTX should have paid for healthcare services, it falls outside of "direct damages." Little River responds first that Downton is collaterally estopped from arguing for a reclassification of damages because the arbitrator finally decided the issue. But if Downton is not estopped, Little River argues that the parenthetical is merely an example of direct damages and is not intended to be an exclusive definition. So, the general meaning of direct damages controls, and the patient-responsibility payments fall within that general meaning.

The parties disagree on what law of collateral estoppel applies. Little River cites federal law, whereas Downton cites Texas law. If a prior decision was issued by a state court, we apply the collateral estoppel law of that state. *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1166 (5th Cir. Unit A 1981). But if the prior case was decided by a federal court, then we apply federal law even if that court was handling a state-law issue. *Id.* Because this was an arbitration award affirmed by a federal court, federal law is the appropriate law to apply. *See Murchison Cap. Partners, L.P. v. Nuance Commc'ns, Inc.*, 625 F. App'x 617, 620–22 (5th Cir. 2015) (applying federal collateral estoppel law to an arbitration of state-law claims).

The tribunal award does not collaterally estop Downton from seeking a contingency fee for a portion of the patient-responsibility payments. Issue preclusion prevents a party from relitigating an issue only when "(1) the identical issue was previously adjudicated; (2) the issue was actually

litigated; and (3) the previous determination was necessary to the decision." *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005) (en banc). Little River cannot make it past the first element. The issue here is whether the patient-responsibility payments constitute direct or consequential damages under the fee agreement between Downton and Little River, but the arbitrator expressly left that determination to the bankruptcy court. Therefore, it cannot be said that the issue was either adjudicated or litigated.[1]

Downton is also correct that the fee agreement adopted a unique definition for "direct damages." The parties agree that Texas law controls. "In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "[S]urrounding facts and circumstances cannot be employed to 'make the language say what it unambiguously does not say' or 'to show that the parties probably meant . . . something other than what their agreement stated.' " *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, 757 (Tex. 2018) (first quoting *First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017); then quoting *Anglo–Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011)).

The relevant provision of the fee agreement is: "For the avoidance of any ambiguity, consequential and/or punitive damages in the Arbitration are all damages other than direct damages (money that the Arbitrator finds

[1] Texas preclusion law would lead to the same result. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990) (requiring substantially the same elements as federal issue preclusion).

BCBSTX should have paid Little River for healthcare services provided to BCBSTX insureds)." The meaning of each term is clear. The term direct damages means "money that the Arbitrator finds BCBSTX should have paid Little River for healthcare services provided to BCBSTX insureds" and the term consequential and/or punitive damages means "all damages other than direct damages." Little River argues that the parenthetical next to direct damages was not intended to define direct damages but was merely intended to provide an example. But if that were so, one would expect the parenthetical to be presented as an example rather than as an appositive. *See, e.g.*, *Moore v. Noble Energy, Inc.*, 374 S.W.3d 644, 651 (Tex. App.—Amarillo 2012, no pet.) (explaining a parenthetical phrase following a term "explains and defines" the term); *Summit Glob. Contractors, Inc. v. Enbridge Energy, Ltd. P'ship*, 594 S.W.3d 693, 706 (Tex. App.—Hous. [14th Dist.] 2019) (Frost, J., concurring) ("Using parentheticals to define terms is a common practice in legal writing."); *Range Res. Corp. v. Bradshaw*, 266 S.W.3d 490, 496 (Tex. App.—Fort Worth 2008) (finding phrase was "interpreted with the parenthetical that immediately follows it"); *Miller v. Sandvick*, 921 S.W.2d 517, 522 (Tex. App.-Amarillo 1996) ("The parenthetical is used by way of comment, explanation or translation in a sentence that is structurally independent of it, *i.e.*, the material inside the parens is not structurally necessary to the sentence.").

Little River also directs the court to oral conversations preceding the contract and Little River's own subjective intent. But these are precisely the sort of "surrounding facts and circumstances" that cannot change the plain language of the fee agreement. *See URI*, 543 S.W.3d at 757.

So, the question before the court is whether the patient-responsibility payments were "money that the Arbitrator finds BCBSTX should have paid Little River for healthcare services." As to that question, we find that the district and bankruptcy courts erred. The bankruptcy court stated that these

amounts were payments that "Little River billed to insurers which Blue Cross was found to have improperly denied." But that refers to the shortfall attributed to "totally or partially denied claims," a different monetary award from which Downton did not try to recover. The patient-responsibility payments, instead, were "amounts and non-covered services that the subscriber, rather than BCBSTX, is responsible for paying." It follows that the patient-responsibility payments were not money that "BCBSTX should have paid Little River for healthcare services," and thus, were not direct damages under the fee agreement. And under the fee agreement, since they are not direct damages, they are consequential damages from which Downton may draw a contingent fee.[2]

C. Prompt-Payment Penalties

Downton contends that the courts erred when they found that the statutory prompt-payment penalties did not constitute damages. He points to the Texas Supreme Court's decision in *Wal–Mart Stores, Inc. v. Forte*, 497 S.W.3d 460 (Tex. 2016), which he claims stands for the proposition that all Texas statutory penalties are damages.

Downton overextends *Wal–Mart Stores*. In *Wal–Mart Stores*, the Texas Supreme Court was asked to determine only whether a civil penalty available through the Texas Optometry Act constituted "exemplary

[2] We do not decide whether these patient-responsibility payments would constitute consequential damages under general Texas damages law, which is a more complicated issue. *Cf. Cherokee Cnty. Cogeneration Partners, L.P. v. Dynegy Mktg. & Trade*, 305 S.W.3d 309, 314–16 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (finding lost profits on third-party contracts to be direct damages where the contract between the plaintiff and defendant contemplated the third-party transactions such that "any wrongful interference . . . would naturally and necessarily cause [plaintiff] to suffer direct damages in the form of profits *on the Agreement itself*"). Because Downton and Little River included a unique definition of the term "direct damages," our holding merely interprets the provision of their particular contract.

damages" for the purposes of chapter 41 of the Texas Civil Practice and Remedies Code, which imposes restraints on a plaintiff's ability to recover punitive damages. 497 S.W.3d at 461–62. The court concluded that the civil remedy did constitute exemplary damages for the purposes of the chapter, but it did not say that civil penalties constituted damages in the general sense. *Id.* at 466–67. Instead, it explicitly recognized that damages and civil penalties are different. *Id.* at 465–66. Thus, that case does not resolve whether the prompt-payment penalties are damages or civil penalties.

Fortunately, other Texas precedents do. *In re Xerox Corp.* lays out the framework for determining whether a monetary civil remedy constitutes damages or a penalty. There, the Texas Supreme Court had to determine whether an award granted under the Texas Medicaid Fraud Prevention Act constituted damages. *In re Xerox Corp.*, 555 S.W.3d 518, 520 (Tex. 2018). It explained that whether a monetary award is a penalty or damages depends on the statutory language that creates the award. *Id.* at 527 (quoting *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012)). Looking to the text of the statute at issue, it noted that the legislature never used the term "damages" to describe the monetary award, but instead referred to it as a civil remedy, suggesting that the legislature did not intend for the award to be considered damages. *Id.* at 527–28. It also explained that "[m]onetary liability that exists even when no loss has occurred can only be a fine or a penalty, not damages." *Id.* at 530. So, where a statute offers an award that "is fixed without regard to any loss to [the plaintiff] and without a direct benefit to the liable party," the civil remedy is a penalty. *Id.* at 533. The court then concluded that, since the civil remedy at issue was for a fixed value regardless of the plaintiff's actual loss, it was a penalty. *Id.* at 535.

In this case, the prompt-payment claims were made under Texas Insurance Code §§ 843.342 and 1301.137 and Texas Administrative Code § 21.2815. Section 843.342 provides:

> [I]f a clean claim submitted to a health maintenance organization is payable and the health maintenance organization does not . . . pay the claim on or before the date [it] is required to make a determination or adjudication of the claim, the health maintenance organization shall pay the physician or provider . . . the contracted rate owed . . . *plus a penalty* in the amount of the lesser of: (1) 50 percent of the difference between the billed charges . . . or (2) $100,000.

TEX. INS. CODE § 843.342(a) (emphasis added); *see also id.* § 843.342(d), (e). Section 1301.137 reads the same:

> [I]f a clean claim submitted to an insurer is payable and the insurer does not determine . . . that the claim is payable and pay the claim on or before the date the insurer is required to make a determination or adjudication of the claim, the insurer shall pay the preferred provider making the claim the contracted rate owed on the claim *plus a penalty* in the amount of the lesser of: (1) 50 percent of the difference between the billed charges . . . or (2) $100,000.

TEX. INS. CODE § 1301.137(a) (emphasis added); *see also id.* § 1301.137(d), (e).

Finally, Texas Administrative Code § 28.2815 reads:

> An MCC that determines . . . that a claim is payable must pay the contracted rate owed on the claim; and: (1) if the claim is paid on or before the 45th day after the end of the applicable statutory claims payment period, pay to a noninstitutional preferred provider *a penalty* in the amount of the lesser of: (A) 50 percent of the difference between the billed charges and the contracted rate; or (B) $100,000[.]

TEX. ADMIN. CODE § 21.2815(a) (emphasis added); *see also id.* § 21.2815(a)(2), (4). The plain language of the code provisions calls these monetary awards penalties. Moreover, like the statute in *Xerox*, the awards are for a fixed amount regardless of the actual harm experienced by the

plaintiff or the gain experienced by the defendant. Thus, the prompt-payment penalties are indeed penalties.

The fee arrangement between Downton and Little River pays Downton a contingent fee only from "damages," not penalties. A contract's terms must be given their clear meaning, and we must assume that if the parties intended that penalties be covered by the word "damages," they would have so stated. *See URI*, 543 S.W.3d at 757. Therefore, the courts did not err when they denied Downton's application for a contingent fee on this award.

D. Prejudgment Interest

Little River argues that Downton and the courts were collaterally estopped from labeling the prejudgment interest as "interest as damages" rather than "interest as interest." And even if the courts were not estopped, Little River asserts that they erred when they found that this prejudgment interest was interest as damages.

Little River's argument for preclusion fails. A valid and final arbitration has the same preclusive effect as a judgment of a court. *See Colonial Oaks Assisted Living Lafayette, L.L.C. v. Hannie Dev., Inc.*, 972 F.3d 684, 691 & n.25 (5th Cir. 2020). Issue preclusion prevents the same party, or a party in privity, from relitigating an issue when "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." *Holland v. Westmoreland Coal Co. (In re Westmoreland Coal Co.)*, 968 F.3d 526, 532 (5th Cir. 2020) (quoting *Pace*, 403 F.3d at 290). The issue here is whether the interest was "interest as interest" or "interest as damages." That issue was previously adjudicated and actually litigated in the arbitration. The arbitrator considered the issue and concluded that "Little River may not recover interest as damages," but instead could recover "interest as interest." This

determination was necessary to the decision because it affected the interest rate actually applied to the damages.

The problem for Little River is the privity requirement. "For res judicata purposes, this court has held that privity exists in just three, narrowly-defined circumstances: (1) where the non-party is the successor in interest to a party's interest in property; (2) where the non-party controlled the prior litigation; and (3) where the non-party's interests were adequately represented by a party to the original suit." *Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990); *see also Taylor v. Sturgell*, 553 U.S. 880, 893–95 (2008) (listing situations where a nonparty may be precluded). None of these categories applies. Downton was not a successor in interest to Little River's property nor did Downton control the prior litigation. *See Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir. 1990) (describing "control" as being able to decide which claims are or are not brought). Finally, Downton's own interests were not represented by a party to the original suit, because his interests are related to the fee arrangement between himself and Little River as opposed to money owed by BCBSTX to Little River. So, neither the courts nor Downton were barred from considering the issue at the fee-application stage.

Because the issue is not barred, we must decide whether the prejudgment interest that the arbitrator ordered is "interest as damages" or "interest as interest." As well explained by the bankruptcy court, *Cavnar v. Quality Control Parking, Inc.*, and *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, establish the modern legal landscape for prejudgment interest in Texas courts. In *Cavnar*, the Texas Supreme Court noted two types of interest: (1) "[i]nterest as interest," which "is compensation allowed by law or fixed by the parties for the use or detention of money;" and (2) "[i]nterest as damages," which "is compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between

the accrual of the claim and the date of judgment." *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 551–52 (Tex. 1985). After laying out these definitions, the *Cavnar* court found that—when calculating prejudgment interest for wrongful death, personal injury, and survival actions—prejudgment interest could begin to accrue "from a date six months after the occurrence of the incident giving rise to a cause of action." *Id.* at 555.

Soon after, the Texas legislature adopted a law, Section 6, that largely adopted the *Cavnar* approach with a change to the dates on which interest may begin to accrue[3]—prejudgment interest for wrongful death, personal injury, and survival actions could begin "(1) 180 days after the date the defendant receives written notice of a claim or (2) the day the suit is filed." *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 529 (Tex. 1998). A problem then arose: Texas courts were unsure on whether to apply the *Cavnar* calculation or Section 6 calculation to prejudgment interest in non-personal-injury suits. *Id.* at 529–30. The Texas Supreme Court issued *Johnson* to answer that question, and it did so by conforming *Cavnar*'s interest computation to the computation established by Section 6. *Id.* at 531. The court adopted "the Legislature's approach to prejudgment interest and [held] that, under the common law, prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed." *Id.*

What can be taken from these cases is that "interest as interest" is a particular interest rate fixed by law or contract that applies to a particular use or detention of money. "Interest as damages," on the other hand, refers to the compensation a court awards to a party for the lost use of money during

[3] Section 6 also modified the rate at which interest would compound, but that is not relevant here.

the time that lapses between the accrual of a claim and the date of the judgment. At Texas common law, interest as damages begins to accumulate at the earlier of 180 days after a defendant gets written notice of a claim or the date a suit is filed.

With that knowledge as the backdrop, the bankruptcy and district courts correctly labeled the prejudgment interest awarded to Little River as interest as damages. The arbitrator granted Little River prejudgment interest at a five-percent rate starting from "the earlier of (a) 180 days after the date written notice is received, or (b) the date suit is filed." She recognized that the interest was not commanded by statute, but rather was appropriate under common law, citing both *Johnson* and *Cavnar*. So, while she labeled the prejudgment interest awarded as interest as interest, that interest was really interest as damages.

This does not fully resolve the inquiry, however. Little River argues that, even if the prejudgment interest was interest as damages, interest as damages itself does not constitute compensatory damages. To support this argument, it points to Texas Supreme Court holdings that state that prejudgment interest did not constitute damages in the context of supersedeas bonds. *In re Longview Energy Co.*, 464 S.W.3d 353, 360 (Tex. 2015); *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 173 (Tex. 2013). But these cases do not extend beyond their supersedeas-bond application nor do they establish that prejudgment interest can never be compensatory damages.

Rather, in *In re Xerox Corp.*, the Texas Supreme Court explained "[i]nterest is generally compensatory, but not necessarily, and sometimes damages, but not always." 555 S.W.3d at 530–31 (citations omitted). It distinguished a case like *Cavnar*, which involved prejudgment interest that was damages, from a case like *Nalle*, which involved interest within a

supersedeas bond and thus was not damages. *Id.* at 531 n.72. The general rule, however, is that prejudgment interest is viewed "as falling within the common law meaning of damages." *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 812 (Tex. 2006). As *Cavnar* explains, whether prejudgment interest is damages depends on its purpose. An award of interest due to the lost use of money owed during the pendency of a suit would constitute compensatory damages, whereas interest ordered for another reason may not. *See In re Xerox*, 555 S.W.3d at 531. Here, the interest was awarded to compensate Little River for its lost use of money owed by BCBSTX. Thus, it constitutes compensatory damages.

The last step is to determine whether these compensatory damages were recoverable in Downton's contingency fee. That depends on whether they were direct damages ("money that the Arbitrator finds BCBSTX should have paid Little River for healthcare services provided to BCBSTX insureds") or consequential damages ("all damages that are not direct damages"). Because the interest owed was "not money that BCBSTX should have paid Little River for healthcare services," but rather was money BCBSTX owed as a consequence of not paying Little River at the time payment was initially due, it falls into the latter definition. It follows that it was recoverable in Downton's contingency fee and the courts did not err when they awarded that fee.

III.

Downton also lodges several estoppel-based arguments. He claims that: (1) Little River was judicially estopped from challenging his interpretation of the fee agreement, (2) Little River was subject to quasi-estoppel because it accepted the benefits of Downton's counsel, (3) Little River ratified or waived objection to Downton's interpretation through its briefing to the arbitrator and other state entities, and (4) Little River was

equitably estopped because it was previously silent on Downton's anticipated fee. Each is without merit.

A. Standard of Review

As a threshold matter, unlike the legal issues discussed above, we review the bankruptcy and district court's denial of equitable remedies only for an abuse of discretion. *Superior Crewboats Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 334 (5th Cir. 2004).

B. Downton's Arguments

Judicial estoppel. In this circuit, judicial estoppel has three requirements. A party is judicially estopped only if: (1) "its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous position; and (3) the non-disclosure must not have been inadvertent." *Id.* at 335. Acceptance by the court requires "that the first court [have] adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Id.* (quoting *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999)). The arbitrator did not accept any contingency-fee-based argument that Little River put forward. Instead, she explained that the arrangement was not determinative of fee shifting, that Texas law forbade her from shifting a contingency fee, and that fee-shifting must be determined by means of a lodestar calculation. Since the arbitrator did not accept (or reject) Little River's argument, judicial estoppel does not apply.

Quasi-estoppel. Under Texas law, quasi-estoppel "forbids a party from accepting the benefits of a transaction or statute and then subsequently taking an inconsistent position to avoid corresponding obligations or effects." *Hartford Fire Ins. Co. v. City of Mont Belvieu*, 611 F.3d 289, 298 (5th Cir. 2010) (quoting *Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.—

Corpus Christi 1994, writ denied)). A plaintiff must show that the inconsistency is the cause of the plaintiff's detriment. *Id.* Downton first argues that Little River cannot change its position on the contingency-fee interpretation because it sought to shift that fee at arbitration (and approved draft communications to other entities involving those same arguments). But those legal arguments were not the cause of Downton's current detriment (nor did they grant Little River any wrongfully obtained benefit) because the arbitrator did not adopt such arguments but instead awarded fees based on a lodestar calculation.

Downton further contends that "Little River accepted the benefit of Downton's work with knowledge of his interpretation of the Engagement Letter, eventually obtaining a $108 million judgment, including a $1.7 million contingent fee for Downton's work." First, the $1.7 million "contingent fee" is not actually related to the contingency fee that Downton seeks under his fee agreement, but rather is a lodestar calculation based on his hours worked—so, there is little meaning to be derived from that award. It is also not clear that Little River did understand Downton's interpretation of the engagement letter. Without these assertions, Downton's argument boils down to this: Little River entered into a contract with him for legal representation and allowed him to represent it, so it cannot now challenge his interpretation of the fee arrangement. But that simply is not a position that the quasi-estoppel doctrine recognizes or protects. *See Fasken Land & Minerals, Ltd. v. Occidental Permian Ltd.*, 225 S.W.3d 577, 594 (Tex. App.—El Paso 2005, pet. denied) ("We simply fail to see how agreeing to the parties' contract amounts to an inconsistent position with [defendants'] later assertion of its voting rights under that same contract. . . . Under [plaintiffs'] analysis, quasi-estoppel would lie in any breach of contract claim."). Therefore, Downton's quasi-estoppel argument fails.

Ratification/waiver. Downton's ratification/waiver arguments function similarly to his quasi-estoppel argument. They also falter similarly. Ratification tends to arise where, through a party's conduct, that party accepts the terms of a contract (and thus cannot later claim he or she was not a party to that contract's terms). *See, e.g.*, *Thomson Oil Royalty, LLC v. Graham*, 351 S.W.3d 162, 166 (Tex. App.—Tyler 2011, no pet.) ("Ratification occurs when a party recognizes the validity of a contract by acting under it, performing under it, or affirmatively acknowledging it."). Downton contends that, because Little River submitted the fee agreement to the bankruptcy court and sought fee-shifting from the arbitrator, it ratified Downton's understanding of the fee agreement. But that Little River agreed to the contract and submitted it to the bankruptcy court does not ratify Downton's understanding of the contract. Moreover, while Little River did submit briefs to the arbitrator seeking fee-shifting that would recover a contingency fee as described by Downton, the arbitrator did not accept (or reject) the argument but rather explained it would not be interpreting the fee agreement. Therefore, Little River did not receive any benefits inconsistent with its current arguments, and Downton cannot receive an equitable remedy to correct a nonexistent inconsistency.

Estoppel by silence. Finally, Downton argues that Little River should have been equitably estopped because, through its silence, it induced Downton to act as counsel while knowing it would seek to contest the contingency-fee award. Under Texas law, equitable estoppel requires

> (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations.

Med. Care Am., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 341 F.3d 415, 422 (5th Cir. 2003) (quoting *Johnson*, 962 S.W.2d at 515–16). Downton cannot satisfy the first element—he has not demonstrated a concealment or false representation by Little River; he has merely demonstrated a disagreement on the meaning of the contractual terms. Thus, this claim fails as well.

IV.

In conclusion, we find that the appellant has demonstrated an error on the part of the district and bankruptcy courts when the courts categorized the patient-responsibility payments as direct damages. We otherwise find that the courts properly categorized the monetary awards. Accordingly, the judgment of the district court is REVERSED in part and AFFIRMED in part. We REMAND for the court to calculate attorney's fees consistent with this opinion.