

PROPORTIONATE RESPONSIBILITY

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PROPORTIONATE RESPONSIBILITY

I. SCOPE OF PAPER

The law of "proportionate liability," set forth in Chapter 33 of the Texas Civil Practice & Remedies Code, is the comprehensive statutory basis for allocating fault between plaintiffs, defendants, responsible third parties, and settling parties, and for reducing verdicts as a result of settlements or plaintiffs' contributory negligence. Section 33.004 sets forth the procedure for designating a "responsible third party," which is defined in §33.011(6).

"Proportionate responsibility" includes concepts that were embraced as "contribution" at one time under the Civil Practice and Remedies Code. The terms "contribution" and "indemnity" are frequently used synonymously. Nevertheless, these two words have different meanings. "Contribution" is the payment by a joint tortfeasor of its proportionate share of the plaintiff's damages to any other tortfeasor, who has previously paid more than his proportional share. *See* Chapter 32 of the Texas Civil Practice & Remedies Code. "Indemnity" is the shifting of the entire liability to the plaintiff from one joint tortfeasor to another. Essentially, "indemnity" shifts the entire loss while "contribution" is a sharing of the loss presumably in proportion to each tortfeasor's level of fault or overall culpability.

This paper will address and contribution and proportionate responsibility law in Texas today with particular emphasis on the changes to Texas' complex contribution/proportionate responsibility law for cases filed on and after July 1, 2003 and the more limited change to the calculation of settlement credits for certain cases tried on or after June 9, 2005. We have included an analysis of (1) which of the multiple comparative schemes apply, (2) the mechanisms for the calculations of a particular comparative amount, and (3) the various statutory provisions associated with this complex area of the law.

II. PROPORTIONATE RESPONSIBILITY (AT TIMES KNOWN AS "CONTRIBUTION" OR "COMPARATIVE NEGLIGENCE")

There are currently six proportionate responsibility schemes under Texas law, five statutory and one based on case law. These six schemes are:

- (1) TEX. CIV. PRAC. & REM. CODE §32.001 *et seq.*: The original contribution statute enacted in 1917;
- (2) TEX. CIV. PRAC. & REM. CODE §33.001 *et seq.* prior to the 1987 amendments: The

comparative negligence statute enacted in 1973;

- (3) TEX. CIV. PRAC. & REM. CODE §33.001 *et seq.* after the 1987 amendments: The comparative responsibility statute enacted in 1987;
- (4) *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984): Common law contribution by comparative causation;
- (5) TEX. CIV. PRAC. & REM. CODE §33.001 *et seq.* after the 1995 amendments to the comparative responsibility statute (which at this point became known as the proportionate responsibility statute), effective September 1, 1995; and
- (6) TEX. CIV. PRAC. & REM. CODE §33.001 *et seq.* after the 2003 amendments to the proportionate responsibility statute, effective July 1, 2003 (with §33.012 modified effective June 9, 2005).

This paper will discuss the schemes applicable to cases filed after September 1, 1995.

A. What Law Applies

Determining which contribution scheme applies to a particular case requires a three step inquiry. First, counsel must determine the date upon which all or any part of the suit was filed. *See* Tex. Civ. Prac. & Rem. Code §33.001. Second, counsel must determine when the cause of action accrued. Third, counsel must determine the theories of liability to be adjudged by the trier of fact against the defendants.

If a tort cause of action accrues on or after September 1, 1995 or suit is first-filed on or after September 1, 1996 but before July 1, 2003, then the proportionate responsibility statute passed as part of the 1995 tort reform amendments will apply.

If a tort cause of action is first-filed on or after July 1, 2003, then the proportionate responsibility statute passed as part of the 2003 tort reform amendments will apply.

When a non-health care liability tort cause of action is tried on or after June 9, 2005, any credit for settlements will be governed by the 2005 amendment to TEX. CIV. PRAC. & REM. CODE §33.012(b).

B. 1995 Tort Reform - The Proportionate Responsibility Statute

The 1995 tort reform amendments made some notable changes regarding contribution calculations and mechanics. In this subsection of the paper, citations to Chapter 33 of the Texas Civil Practice & Remedies Code refer to the statutes effective on September 1, 1995 (prior to the 2003 amendments discussed in Section C. below).

1. Does the 1995 proportionate responsibility statute apply?

It is important first of all to determine what types of lawsuits are covered by Chapter 33. The Chapter's applicability is described in Section 33.002. The Chapter broadly applies to “any cause of action based on tort.” That is expressed in subdivision (a) of Section 33.002, which replaced the 1987 version of subdivision (a) expressly providing that the Chapter did not apply to a claim based on intentional tort or a claim for exemplary damages. *See Harris v. Archer*, 134 S.W.3d 411, 435 (Tex. App. - Amarillo, 2004, pet. denied). A breach of implied warranty claim under Article 2 of the Uniform Commercial Code is a tort action and is accordingly subject to the proportionate responsibility scheme. *JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008).

Chapter 33 contains express exclusions to its applicability. Chapter 33 does not apply to workers compensation claims or to exemplary damages claims, including actions against an employer for exemplary damages arising out of an employee's death. TEX. CIV. PRAC. & REM. CODE ANN. §33.002(c). *See also Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104, 111 (Tex. 2004) (CPRC Chapter 33 does not apply to a UCC-based conversion claim).

2. 51% Bar

The 1995 Proportionate Responsibility Statute enacted a 51% bar rule applicable to all cases falling within the statute. TEX. CIV. PRAC. & REM. CODE §33.001. In other words, if the plaintiff is judged to be 51% at fault, any recovery is barred. The 60% bar rule for products liability cases was eliminated.

3. Joint and Several Liability

a. The primary rule: no joint liability unless more than 50% at fault

The Proportionate Responsibility Statute states that a defendant will be jointly and severally liable only if its percentage of responsibility is “greater than fifty percent.” TEX. CIV. PRAC. & REM. CODE §33.013(b). This rule was applied in conjunction with §33.012 in *Sugar Land Properties, Inc. v. Becnel*, 26 S.W.3d 113 (Tex. App. - Houston [1st Dist.] 2000, no pet.). In this case the plaintiff sued three defendants, two of which settled with the plaintiff for a total of \$12,500. *See Sugar Land Properties, Inc.*, 26 S.W.3d at 115. The case against the remaining defendant, Sugar Land, was tried to a jury. *See id.* After trial, a judgment was entered for \$52,730 with responsibility allocated as follows:

Settling Defendants	30%
Sugar Land	70%

The issue on appeal was “whether a defendant whose responsibility is greater than 50% is jointly and severally liable for the amount remaining after that defendant has received a dollar-for-dollar credit for all settlements.” *Id.* at 120. The court held that such a defendant is jointly and severally liable for the remaining amount basing its holding on the following language of §33.013(b):

Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if the percentage of responsibility attributed to the defendant is greater than 50 percent.

Id. at 119. As a result, the court held that Sugar Land was jointly and severally liable for the recoverable damages of \$40,230 (\$52,730 minus the \$12,500 dollar-for-dollar settlement credit) because the jury attributed more than 50% of the fault to Sugar Land. *See id.* at 121.

Note that given this threshold, there can only be *one* jointly and severally liable defendant in the case. For that defendant, the current rules of contribution apply. All of the other defendants need not be concerned with contribution because they will never pay more than their own share of fault as assessed by the trier of fact.

b. When joint liability still applies

For cases filed prior to July 1, 2003, there are exceptions to that general rule. Joint and several liability is reintroduced if (1) the defendant is 15% or more responsible for the occurrence, and (2) the claimant's personal injury, property damage, death, or other harm, (a) is caused by the depositing, discharge, or releasing into the environment of any hazardous or harmful substance as described in §33.011(7), or (b) resulted from a toxic tort.

Further, joint and several liability is imposed upon any defendant “who, with the specific intent to do harm to others, acts in concert with another person to engage in” certain criminal conduct, namely the following:

- Murder
- Capital murder
- Aggravated kidnapping
- Aggravated assault

- Sexual assault
- Aggravated sexual assault
- Injury to a child, elderly individual, or disabled individual
- Forgery
- Commercial bribery
- Misapplication of fiduciary property or property of financial institution
- Securing execution of document by deception
- Fraudulent destruction, removal, or concealment of writing; or
- Conduct described in Chapter 31 of the Penal Code the punishment level for which is a felony of the third degree or higher.

See TEX. PENAL CODE §§19.02, 19.03, 20.04, 22.02, 22.011, 22.021, 22.04, 32.21, 32.43, 32.45, 32.46, & 32.46. The delineated criminal conduct parallels that outlined in the new punitive damages statute, except for intoxication assault and intoxication manslaughter.

The "intent to do harm" language quoted above is specifically defined by Chapter 33 to apply when it is the person's conscious effort or desire to engage in such conduct for purpose of doing substantial harm to others." TEX. CIV. PRAC. & REM. CODE ANN. §33.002(e).

In order to fall within the criminal acts exception, a defendant's conduct must include "specific intent to do harm to others" before this exception applies, Penal Code provisions to the contrary notwithstanding. (Section 33.002(b) and (d).) "Intent to do harm" means it is the actor's "conscious effort or desire to engage in [the defined] conduct for the purpose of doing harm to others[.]" with respect to the nature and result of that conduct. (Section 33.002(e).) The actors, however, are jointly liable only for the "legally recoverable" damages proximately caused by the conduct. (Section 33.002(b).)

Chapter 33 precludes the jury from knowing that the conduct to which the exception applies is defined by the Penal Code. (Section 33.002(g).) And no jury submission regarding conduct is mandated unless "sufficient evidence" supports the submission. (Section 33.002(f).)

4. Responsible Third Parties

The 1995 proportionate responsibility statute introduced a new term, "the responsible third party." A

responsible third party is a party who is joined by means of a timely motion filed by an existing defendant in the case. Section 33.004 allows any defendant to join the responsible third party who has not been sued by the claimant. The joinder must occur prior to the expiration of limitations of the claimant's cause of action for damages, unless the third party claim is filed on or before 30 days after the date of the defendant's answer is required to be filed. That period of extension does not exist if the limitations period governing the claimant's action against the defendant joining the responsible third party is longer than the limitations period governing the claimant's action against the responsible third party.

This term of "responsible third party" is further defined in the statute. The term means any person to whom all of the following apply:

- The court in which the action was filed could exercise jurisdiction over the person;

- The person could have been, but was not, sued by the claimant; and

- The person is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant or defendants.

At the same time, a responsible third party cannot be:

- The claimant's employer, if the employer maintains workers compensation insurance coverage;

- A person or entity that is a debtor in bankruptcy proceedings or a person or entity against whom this claimant has been discharged in bankruptcy, except to the extent that liability insurance or other source of third party funding may be available to pay claims asserted against the debtor; or

- A seller eligible for indemnity under §82.002 as an innocent retailer unless there is alleged against the seller a claim for relief based on the seller's negligence, intentional misconduct, or other act or omission, such as negligently by modifying or altering a product, for which the seller is independently liable to the claimant.

On timely motion, a defendant may join a "responsible third party" any time before the statute of limitations applicable to the claimant's claim expires or thirty days after the defendant's answer is due, whichever is later. (Section 33.004(a) and (d).) No later than sixty days after the defendant's third-party claim is filed, the

claimant who "seeks to" also can join the responsible third party, even if the claim would be otherwise time-barred. (Section 33.004(e).) The phrase "seeks to join" is not defined.

The 1995 statute does not define the "timely motion" that the defendant must file to join the third party. The statute does not mandate that the court grant the motion, either. Thus, the cautious lawyer will determine as soon as possible after answer whether a third-party claim is appropriate.

It is not clear what §33.004 adds to the law since it provides in subdivision (b) that it is not intended to affect third party practice as previously recognized in the rules and statutes of the state with regard to the assertion by defendant of rights to contribution or indemnity.

One commentator who has addressed this issue has opined that "in reality, this is nothing more than recognizing the practice of adding third-party defendants to a suit in the context of the joint and several liability statute." See Gallagher, *Legislative Update: Joint and Several Liability, The University of Texas School of Law 19th Annual Page Keeton Products Liability and Personal Injury Law Conference (1995)*. Other procedure experts believe, however, that Section 33.004 actually expands permissible third party practice to include all potential tortfeasors.

Under current law, despite some language in Civil Procedure Rule 38 [T.R.C.P. 38] that suggests otherwise, a defendant probably may not join a third-party defendant merely because of that person's potential liability to the plaintiff. (See *Williams v. Ballard*, 722 S.W.2d 9, 11 (Tex. App. - Dallas 1986, no writ) ("Does a defendant have a right to demand that plaintiff add additional parties in order that plaintiff may obtain complete relief? We think not.").

Dorsaneo and Zwalenburg, *C.P.R.C. Ch. 33 Rewritten: Limits on Plaintiff's Recoveries: Proportionate Responsibility; Responsible Third-Parties; Protections for Property Owners*, Texas Torts Update, Vol. 1995, Issue No. 8, p. 212.

The most significant change in Texas practice created by Section 33.004 of the 1995 amendments, however, involves the way in which the issues of comparative responsibility are submitted to the trier of fact. Prior to 1995 tort reform, where third-party defendants were involved in a lawsuit, there was a first set of jury questions in which the only fault submitted was that of the plaintiff(s), any settling party or parties, and the defendant(s) from whom the plaintiff(s) was (were) seeking relief at the time of submission. If the

defendant(s) was (were) found liable, it was only at that time that the fault of the third-party (or contribution) defendant(s) was apportioned as against the liable defendant(s) via a second set of questions. Under 1995 tort reform, however, Section 33.003 expressly provides that the trier of fact shall determine the percentage of responsibility for a given occurrence of all of the following:

- (1) each claimant;
- (2) each defendant;
- (3) each settling person; and
- (4) each responsible third-party who has been joined under Section 33.004.

TEX. CIV. PRAC. & REM. CODE §33.003 (emphasis added); see also *Joint and Several Liability: Hearings on Tex. S.B. 28, before the Senate Comm. on Econ. Develop.*, 74th Leg., R.S. 55-67 (February 28, 1995).

The result is that defendants have increased incentive to join "responsible third-parties" to reduce their share of potential responsibility before the jury.

5. Settlements & Credits

The above provisions on joint and several liability deal, of course, with the situation of a case that is tried to a jury. Chapter 33 further addresses the impact of settlements. As mentioned above, any settling defendant must still be submitted to the jury for determination of percentage of responsibility. The more important issue as to settling parties is how the remaining defendant or defendants can take a credit for settlements.¹ Credit for settlements can occur in one of two ways:

- The sum of the dollar amount of all settlements; or
- A dollar amount equal to the sum of the following percentage of damages bound by the trier of fact:
 - a. 5% of those damages up to \$200,000;
 - b. 10% of those damages from \$200,001 to \$400,000;
 - c. 15% of those damages from \$400,001 to \$500,000; and
 - d. 20% of those damages greater than \$500,000.

The sliding scale shown above is identical to the sliding scale originally enacted in 1987.

If a claimant has settled with one or more defendants, an election must be made as to which

¹ See *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005) for discussion of application of settlement credits in cases involving past damages, future damages, and accrued prejudgment interest.

dollar credit is to be applied under §33.012(b). This election shall be made by any defendant following a written election before the issues of the action are submitted to the trier of fact and, when made, should be binding on all defendants. If no defendant makes the election, or if conflicting elections are made, then all defendants are considered to have elected the sliding scale that is contained in subdivision (2) of §33.012(b).

6. Summary of 1995 Proportionate Responsibility
Here are the main rules under the statute:

- The trier of fact must determine the percentage of responsibility, stated in whole numbers, for each claimant, defendant, settling person, and joined responsible third party that caused or contributed to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violated an applicable legal standard, or by any combination of these. (Section 33.033.)
- If the claimant is not barred from recovery, benefits paid under workers' compensation insurance coverage shall not reduce the award of damages. (Section 33.012(d).)
- Existing indemnity law remains largely unaffected. (Section 33.017.)
- The claimant is barred from recovery in all cases in which the percentage of responsibility is greater than 50%. (Section 33.001.)
- A defendant must be 51% or more responsible to become jointly liable for damages. A defendant will be jointly and severally liable only if its percentage of responsibility is 51% or more ("greater than 50%"). (Section 33.013(b).) For that defendant, the current rules of contribution apply. Most other defendants need not be concerned with contribution because they will never pay more than their own share of fault. However, a defendant's threshold for joint and several liability in environmental pollution or toxic tort cases (including claims involving exposure to workplace substances) is 15%. (Sections 33.011(7) and 33.013 (c).)

C. 2003 Tort Reform

The Texas Legislature, once again, made significant changes to the Proportionate Responsibility Statute in 2003. Many aspects of the 1995 Proportionate Responsibility Statute still remain. Instead of restating all the rules recited in the prior portions of this paper, this section will only discuss how the 2003 amendments change the prior law.

Accordingly, in order to gain a complete understanding of all Proportionate Responsibility rules, one must review the paper in its entirety. Thus far, we know of no reported cases discussing or interpreting the 2003 amendments.

In this subsection of the paper, citations to Chapter 33 of the Texas Civil Practice & Remedies Code refer to the statutes effective July 1, 2003.

1. Does the 2003 Proportionate Responsibility Statute Apply?

The 2003 amendments to the Proportionate Responsibility Statute apply to cases filed on or after July 1, 2003. Chapter 33 applies to "any cause of action based in tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." TEX. CIV. PRAC. & REM. CODE §33.002(a)(1). In addition to "any cause of action based in tort," Chapter 33 also covers:

any action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.

TEX. CIV. PRAC. & REM. CODE §33.002(a)(1).

2. Responsible Third Parties

The 2003 amendments to section 33.004 significantly change the requirements and procedure for designating responsible third parties. Section 33.004(a), as amended, reads:

A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

TEX. CIV. PRAC. & REM. CODE §33.004(a).

a. Joinder is No Longer Required, Just Designation

Under the 2003 amendments, joinder in the case is no longer required, just designation. *See Bueno v. Cott Beverages*, 2005 WL 647026 (W.D. Tex., Feb. 8, 2005) (allowing designation under 2003 statutes beyond deadline for joining additional parties). The designation of a person as a responsible third party or the finding of fault by a jury as to that responsible third party (1) does not by itself impose liability on the

person; and (2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability. TEX. CIV. PRAC. & REM. CODE §33.004(i)(1) and (i)(2) as amended by HB4. *See also Werner v. KPMG LLP*, 415 F. Supp. 2d 688 (S.D. Tex. 2006) (designation as a "responsible third party" under Section 33.004 does not constitute "commencement" of action against that party, but responsible third party's cross-action under Sections 33.015 and .016 for contribution and indemnity constitutes intervention and "commencement," for purposes of determining whether "commencement" as to that party occurred before or after effective date of Class Action Fairness Act).

b. File the Motion to Designate Anytime On or Before the 60th Day Before Trial

The 1995 version of section 33.004(a) required a defendant seeking to join a responsible third party to do so by a "timely motion made for that purpose." TEX. CIV. PRAC. & REM. CODE §33.002(a)(1). "Timely motion" was not further defined and there has been no interpretative case law. The 2003 amendments to section 33.004(a) now specifically prescribe: "The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date." TEX. CIV. PRAC. & REM. CODE §33.004(a). *See In re Unitec Elevator Services Company*, 178 S.W.3d 53 (Tex. App. - Houston [1st Dist.], orig. proceeding) (trial court held not to have abused its discretion in failing to find good cause for defendant's motion to designate, filed approximately 32 days before trial, a co-defendant that had just been non-suited by plaintiffs).

We have noticed that, upon the urging of plaintiffs, some courts are setting deadlines in scheduling orders that require the designation of responsible third parties more than 60 days before trial. We think this is a reversible error because, unlike a rule of civil procedure, a court has no discretion to alter a deadline contained in a statute, such as the Texas Civil Practice & Remedies Code. See Keene Corp. v. Gardner, 837 S.W.2d 224, 232 (Tex. App.—Dallas 1992, writ denied) (reversing a trial court's ruling that ignored the notice deadline contained Texas Civil Practice & Remedies Code § 154.002).

See section "g" below for the time limitations associated with designating as a responsible third party an unknown person who allegedly committed a criminal act.

c. The Motion to Designate May be Filed After Limitations

Under the 2003 amendments, a defendant can designate a responsible third party anytime before the

60th day before trial. The claimant may then join the designated responsible third party, even though limitations would otherwise bar the claim, provided joinder occurs not later than 60 days after that person is designated as a responsible third party by the defendant. TEX. CIV. PRAC. & REM. CODE §33.004(e). *See also Russell v. Wendy's Int'l, Inc.*, 219 S.W.3d 629 (Tex. App.—Dallas 2007, no pet.) (holding that the savings provision in §33.004(e) allowed claims against defendant that would otherwise have been time barred). Consequently, in protracted litigation subject to the 2003 scheme, persons can be added as parties to a lawsuit years beyond the expiration of the limitations period.

d. Objecting to the Designation of a Responsible Third Party

A court shall grant leave to designate, unless another party files an objection on or before the 15th day after the motion to designate was served. TEX. CIV. PRAC. & REM. CODE §33.004(f). Thus, the trial court appears to have no discretion to deny the designation of a responsible third party in most instances. The court may deny the motion for designation only when an objecting party shows:

- (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure; and
- (2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.

TEX. CIV. PRAC. & REM. CODE §33.004(g).

Given the liberal pleading requirements of the Texas Rules of Civil Procedure, almost all timely motions to designate will be granted. *Bueno*, 2005 WL 647026 (factual allegations satisfied statute).

e. Responsible Third Party Does Not Include a Seller Eligible for Indemnity under Chapter 82.

There is no change in the law in this regard. A defendant may still not designate a seller eligible for indemnity under chapter 82 as a responsible third party. TEX. CIV. PRAC. & REM. CODE §33.004(c).

f. The Responsible Third Party Can Be a Person Over Whom the Court Has No Jurisdiction and Who May Not Even Be Liable to the Plaintiff.

The 2003 amendments eliminate all of the limitations on who could be a responsible third party contained in the 1995 statutes, except as to a seller

eligible for indemnity under Chapter 82. The 2003 amendments give the following definition:

“Responsible third party” means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.

TEX. CIV. PRAC. & REM. CODE §33.011(6).

Thus, under the 2003 amendments, the key requirement is that the designated person is alleged to have caused or contributed to cause the harm for which recovery of damages is sought. A responsible third party can now include a claimant’s employer who enjoys a workers’ compensation bar, a person who enjoys bankruptcy protection, a person or entity beyond the jurisdictional reach of our courts, or unknown criminals, as discussed in detail below. Obviously, the elimination of the prior limitations regarding who could be a responsible third party will encourage defendants to name additional parties and further dilute their respective percentages of responsibility. *But see Mims v. Dallas County*, 2006 WL 398177 (N.D. Tex. 2006) (refusing to allow defendant county’s designation of contracting hospital as responsible third party in inmate plaintiffs’ civil rights action against county for failure to provide adequate medical care; “application of the Texas proportionate responsibility scheme would frustrate the two primary goals of 42 U.S.C. § 1983 – compensation and deterrence”).

g. “John Doe” Criminally Responsible Third Parties

The 2003 amendments provide a procedure whereby a defendant can add as a responsible third party an unknown person who allegedly committed a criminal act. In an answer filed within 60 days after the filing of a defendant’s original answer, a defendant may allege that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit. *See In re Unitec*, 178 S.W.3d at 60-61 (objection to designation sustained where defendant moved to designate unknown vandals as responsible third parties more than 60 days before trial but had not filed answer making the required allegation against such unknown vandals within 60 days after filing its original answer). If the defendant files such an answer, the court shall grant a motion for leave to designate the unknown person if:

1. the court determines that the defendant has pled facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;
2. the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and
3. the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.

TEX. CIV. PRAC. & REM. CODE §33.004(j).

h. Striking a Designation of a Responsible Third Party

The 2003 amendments include a provision allowing a party to move to strike a designation of a responsible third party. Section 33.004(l) reads:

After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant’s alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person’s responsibility for the claimant’s injury or damage.

TEX. CIV. PRAC. & REM. CODE §33.004(l).

In essence, this is a no-evidence motion for summary judgment that requires the defendant to come forward with sufficient evidence to create a fact issue to support the submission of the responsible third party in the proportionate responsibility jury question.² *See Bueno*, 2005 WL 647026 (outlining requirements of motion to strike).

i. Mandamus Not Always an Available Remedy for an Improper Denial of a RTP Designation

After a relator’s timely motion to designate a responsible third party was denied by the trial court, the relator sought mandamus relief from the First Court of Appeals. *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 63 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Despite finding that the denial of the right to designate responsible third parties was improper, the Court of Appeals held that mandamus relief was not

² There are no cases indicating whether a motion to strike designation is subject to the timing requirements of a motion for summary judgment.

proper because the relator had an adequate remedy by appeal. *Id.* Describing relator's action as a "relatively straightforward personal injury case," the court found that the "trial court's error [could] be corrected, if necessary, through a normal appeal, which would not result in an enormous waster of resources . . ." *Id.* (internal quotations omitted).

The *Unitec.* court distinguished *In re Arthur Andersen*, 121 S.W.3d 471 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) in which Andersen was granted mandamus relief on the denial of its motions to designate multiple financial institutions as responsible third parties. *Id.* Due to the size and complexity of claims in *Arthur Andersen*, a traditional appeal would cause such an "enormous waste of resources" as to create no adequate remedy at law. *Id.*

3. Determination of Percentage of Responsibility

Section 33.003(a) maintains the fact finder's responsibility to determine the percentages of responsibility for all persons who caused or contributed to cause the harm for which damages are sought – for each claimant, each defendant, each settling person, and each responsible third party designated (not joined) under Section 33.004. New subsection (b) makes clear that submission of a question regarding any person is not allowed without sufficient evidence to support the submission.

4. Submission Must Be Supported By the Evidence

The 2003 amendments codified what was previously understood to be the law - submission of any person in the proportionate responsibility question requires sufficient evidence to support the submission. In *The Kroger Company v. Betancourt*, 996 S.W.2d 353 (Tex. App. - Houston [14th Dist.] 1999, rev. denied), the Fourteenth Court of Appeals held that the submission of a settling party was not mandatory. Rather, the submission must be supported by the defendant's pleadings that the settling party was at fault and there must be sufficient evidence of the fault admitted in trial. The 2003 amendments have essentially codified this holding by adding Section 33.003(b), which reads:

This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support that submission.

5. Settlements & Credits

The legislature significantly modified the way settlement credits are handled for cases filed on or after July 1, 2003. To figure the settlement credit, you must first determine whether your claim is a Health Care Liability Claim under Chapter 74. Health care claims

are those against doctors, nurses, hospitals, and medical devices. Non-health care claims involve all other tort claims.

a. Credit for Claimant's Percentage of Responsibility

As under the 1987 and 1995 schemes, a claimant's recovery is reduced by a percentage equal to the claimant's percentage of responsibility. TEX. CIV. PRAC. & REM. CODE §33.012(a).

b. Credit for Settlements in Non-Health Care Liability Claims

In non-health care liability claims, the dollar for dollar credit and sliding scale credits are totally eliminated. Now, the settlement credit is calculated as follows:

If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to each settling person's percentage of responsibility.

TEX. CIV. PRAC. & REM. CODE §33.012(b).

c. Credit for Settlements in Health Care Liability Claims

Claimants with health care liability claims under chapter 74 also follow different settlement credit rules under the 2003 amendments.

Notwithstanding Subsection (b), if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:

- (1) the sum of the dollar amounts of all settlements; or
- (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

TEX. CIV. PRAC. & REM. CODE §33.012(c). Thus, in a health care claim the defendants have the option to elect a dollar for dollar credit or the new percentage credit described above. As with the 1995 election rules, the defendant must make the election before submission to the jury. One election is binding on all defendants. If no defendant makes an election or if there are conflicting elections, all defendants are considered to have elected the dollar for dollar reduction.

6. Joint & Several Liability

The 2003 amendments eliminated joint and several liability for toxic torts and toxic releases. Other than that modification, the joint and several rules did not change in substance from 1995 to 2003. However, the location of those rules is now consolidated in section 33.013.

7. Definition of Claimant Expanded

The 2003 amendments expanded the definition of "claimant." As discussed later in the paper in the section on "Derivative Claim Problems: *Utts* and *Drilex*," this expanded definition of claimants presents potential problems in multi-plaintiff cases based on derivative liability where there is still a dollar for dollar credit. In non-health care claims, the elimination of the dollar-for-dollar credit avoids the problems presented for multi-plaintiffs with derivative claims. An in-depth discussion of that problem is reserved for later in the paper. But the new definition of claimant essentially codifies the *Drilex* holding and reads:

"Claimant" means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes:

- (A) the person who was injured, was harmed, or died or whose property was damaged; and
- (B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.

TEX. CIV. PRAC. & REM. CODE §33.011(1).

8. Definition of "Settling Person" Modified

A settling person was previously defined in the 1995 amendments as ". . . a person who at the time of submission has paid or promised to pay. . ." This language arguably allowed for post-submission settlements without a corresponding credit. See *Vela v. Garza*, 975 S.W.2d 801 (Tex. App. - Corpus Christi 1998, no pet.).

The 2003 amendments now define a settling person as ". . . a person who has, at any time, paid or promised to pay. . ." TEX. CIV. PRAC. & REM. CODE §33.011(5).

D. 2005 Legislation

In 2005, the Texas Legislature modified the calculation of settlement credits in non-health care liability claims. For issues not involving the calculation of settlement credits in non-health care liability claims, the 2003 amendments continue in effect.

1. Does the 2005 amendment to the proportionate responsibility statute apply?

The 2005 legislature made a modification to Texas Civil Practice & Remedies Code 33.012(b), effective for actions commenced on or after June 9, 2005, or pending on June 9, 2005 where the trial, new trial, or re-trial begins on or after June 9, 2005. Thus, either the filing date or the trial date can trigger the new settlement credit rule.

2. Settlement credits in non-health care liability claims.

In 2005, the legislature eliminated a settlement credit based on the percentage of fault assigned to the settling party. Now, in cases to which the 2005 amendment applies, the settlement credit is a dollar-for-dollar credit. TEX. CIV. PRAC. & REM. CODE §33.012(b). With this return to dollar-for-dollar credit, the 2005 legislature also returned to the *Drilex* problems discussed below.

III. OTHER ISSUES RELATED TO CONTRIBUTION AND INDEMNITY

A. Contribution and Indemnity under Article 21.21 of the Insurance Code

The Texas Supreme Court considered at length the question of contribution as it applies to Article 21.21 of the Texas Insurance Code in *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991). The court reached two major holdings in this case. First, the court concluded that, under the "one satisfaction rule" of *Bradshaw v. Baylor University*, 84 S.W.2d 703 (Tex. Comm. App. 1935, opinion adopted), a non-settling defendant is entitled to contribution credit from monies paid in settlement by co-defendants. Second, the court held that these contribution credits are to be applied after any trebling provided for under the insurance code.

B. Statutes of Limitations for Contribution and Indemnity

The right to receive contribution, like that to receive indemnity, remains derivative from the substantive legal liability of the tortfeasors to the plaintiffs. *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978). The statute of limitations does not begin to run against a cause of action for contribution or indemnity, however, until the contribution plaintiff is

cast in judgment. *Amoco Chemicals Corp. v. Malone Service Co.*, 712 S.W.2d 611 (Tex. App. - Houston [1st Dist.] 1986, no writ).

C. The Single Injury Rule

Defendants can be joint tortfeasors only if they contributed to a "single indivisible" injury to the plaintiff. *Stewart Title*, 822 S.W.2d at 7-8. If the defendants did not cause the same injury, but were each the cause of separate, distinct injuries, the defendants cannot be joint tortfeasors. *Id.* at 8; see *First Title Co. v. Garrett*, 860 S.W.2d 74, 78-79 (Tex. 1993). For example, an asbestos defendant cannot recover any contribution credit for a prior settlement made to the plaintiff for a medical malpractice claim, because the injuries are distinct. *Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520, 52 (Tex. App. - Beaumont 1997, writ denied).

D. No Contribution for Exemplary Damages

A defendant cannot be jointly and severally liable for another defendant's exemplary damage. The Texas Civil Practice and Remedies Code provides specifically that an exemplary damage award must "be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant." TEX. CIV. PRAC. & REM. CODE §41.006.

E. Waiver and Postjudgment Contribution

Generally, if a defendant fails to assert its contribution rights, they are waived. *Newsco Services Div. of Big Three Industries, Inc. v. Lassman*, 686 S.W.2d 197, 199 (Tex. App. - Houston [14th Dist.] 1984, writ ref'd n.r.e.). The defendant has the burden to submit proper contribution issues to the jury. See *Travelers Inc. Co. v. United States*, 283 F.Supp. 14, 31 (S.D. Tex. 1968). Texas courts have held that a defendant who fails to timely assert his contribution rights waives those rights. See *Ohio Medical Products, Inc. v. Suber*, 758 S.W.2d 870, 872 (Tex. App. - Houston [14th Dist.] 1988, writ denied) (holding that a defendant that filed cross claims raising contribution issues for the first time at trial had not timely filed the cross claims and as a result waived them).

The Texarkana Court of Appeals recently held that a defendant is not entitled to seek postjudgment contribution from a non-party in a second lawsuit after the original judgment. See *Casa Ford, Inc. v. Ford Motor Co.*, 951 S.W.2d 865, 873-76 (Tex. App. - Texarkana 1997, pet. denied). The court interpreted the language of Texas Civil Practice and Remedies Code §33.016(b), that provides a defendant "may assert" a contribution claim during the primary action to mean that the defendant must assert the contribution claim during the primary action (even against a non-party), or the contribution claim will be waived. *Id.* at

874; see also *Union City Body Co., Inc. v. Ramirez*, 911 S.W.2d 196, 207-208 (Tex. App. - San Antonio 1995, no writ) (Duncan, J. dissenting). This harsh rule, if broadly adopted, makes it imperative that named defendants file third party petitions and join other potentially liable joint tortfeasors into the primary litigation to protect their contribution rights.

F. Double Dipping Not Allowed

In *Roberts v. Williamson*, 52 S.W.3d 343 (Tex. App. - Texarkana 2001), affirmed 111 S.W.3d 113 (Tex. 2003), the Texarkana Court of Appeals addressed some of the difficulties in correctly applying the 1995 versions of sections 33.012 and 33.013 of the Texas Civil Practice and Remedies Code. This case provides some guidance on the appropriate application of the settlement credit statute.

In *Roberts*, the Williamsons sued a hospital and several physicians for medical malpractice after their newborn child suffered brain injuries as a result of oxygen deprivation. *Roberts*, 52 S.W.3d at 346. The Williamsons settled claims against the hospital and two of the doctors for \$468,750. *Id.* The jury assessed the total damages at \$3,010,001. *Id.* The jury found Dr. Roberts 15% responsible for the damages, and thus, not jointly and severally liable. *Id.* Based on these findings, the trial court rendered judgment against Dr. Roberts for \$451,500.15, an amount equal to fifteen percent of the total damages. *Id.* Dr. Roberts argued that according to section 33.012(b) of the Texas Civil Practice and Remedies Code, the settlement payment (\$468,750) made by the settling defendants should be deducted from her total liability (\$451,500.15) on the dollar-for-dollar basis that she elected under section 33.012(b). *Id.* at 353. This formula would leave the Williamsons with no recovery from Dr. Roberts. *Id.* Alternatively, Dr. Roberts argued that the trial court should have reduced the total amount of damages (\$3,010,001) by the settlement amount (\$468,750) which would leave \$2,541,251, and then multiply that amount by 15% (amount of responsibility attributed to Dr. Roberts by the jury) to reach a \$381,187.65 judgment against Dr. Roberts. Dr. Roberts' suggested formulas for calculating her liability are outlined below:

Roberts argument 1:

Damages = \$3,010,001

Dr. Roberts liability = 15% or \$451,500.15

Deduct hospital settlement credit of \$468,750 from Dr. Roberts = total liability.

(\$451,500.15 - \$468,750) = <17,249.85>

Judgment against Dr. Roberts = \$0

Dr. Roberts argued that the settlement credit should be deducted from her total liability. As the settlement credit is more than her liability, plaintiffs should receive nothing from her.

Roberts argument 2:

Damages = \$3,010,001

Deduct hospital settlement credit of \$468,750 from total damages:

(\$3,010,001 - \$468,750) = \$2,541,251

Dr. Roberts liability:

(.15 x \$2,541,251) = \$381,187.65

Here, Dr. Roberts advocates subtracting the settlement credit from the total damage amount prior to calculating her 15% liability.

The Texarkana Court of Appeals rejected both of Dr. Roberts' arguments regarding her amount of liability. *Id.* The court cited to *C&H Nationwide, Inc. v. Thompson* and stated that Dr. Roberts was not jointly and severally liable to the Williamsons because her liability did not exceed 50%. 903 S.W.2d 315, 321 (Tex. 1994). As such, Dr. Roberts' liability is calculated by multiplying her percentage of responsibility by the total amount of damages. *Id.* Dr. Roberts' liability cannot, however, exceed the total amount of damages less the settlement credit received from the hospital's settlement with the Williamsons. Below is the formula utilized by the court to determine the judgment against Dr. Roberts:

Method utilized by trial court:

Damages = \$3,010,001

Dr. Roberts liability: **(.15 x \$3,010,001) = \$451,500.15**

The court relied on §33.012(a) and multiplied Dr. Roberts' percentage of responsibility by the total damages. Dr. Roberts benefits from the settlement credit because it creates a cap on her liability. Because her 15% responsibility does not exceed \$2,541,251, Dr. Roberts' liability is

correctly calculated by taking 15% of the total damages.

As illustrated above, Dr. Roberts' liability did not exceed the liability cap created by the hospital's settlement with the Williamsons. As such, the court of appeals held that the trial court correctly calculated Dr. Roberts' liability. *Id.* at 354. In upholding the trial court's calculation, the court of appeals stated that the purpose of the settlement credit statute is to prevent a plaintiff from obtaining a recovery in excess of the plaintiff's total damages. *Id.* at 353 (citing *C&H Nationwide, Inc.*, 903 S.W.2d at 321). The liability cap created by the settlement credit ensures that a plaintiff does not receive a recovery in excess of the total damages assessed by the jury.

On July 3, 2003, in *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003), the Texas Supreme Court affirmed the Texarkana Court of Appeals' opinion that a non-settling defendant who is not jointly and severally liable is liable for no more than the percentage of liability found against it by the jury. Thus, Dr. Roberts' percentage of liability was properly multiplied by the total amount of damages found by the jury, with the settlement credit amount acting only as a cap on Dr. Roberts' liability.

G. Derivative Claim Problems: Utts & Drilex

Drilex Sys. Inc. v. Flores, 1 S.W.3d 112 (Tex.1999), and *Utts v. Short*, 31 S.W.3d 822 (Tex. 2002), dramatically affect the way partial settlements are handled in multi-plaintiffs cases based on derivative claims.

The Texas Supreme Court held in *Drilex Sys. Inc. v. Flores* that all members of a family seeking recovery of damages arising out of injuries to one person are considered as a single "claimant" for settlement credit purposes. The Court then held that all settlement dollars paid to all such family members are deducted from the entirety of the recovery award to such family. Thereafter, each family member recovers the percentage of the remaining award, after the settlement reduction, in an amount equal to each family member's percentage of the total dollar awarded by the jury. In *Drilex*, the settling plaintiffs remained as plaintiffs in the lawsuit and proceeded to judgment against non-settling defendants.

In *Utts v. Short*, settlement proceeds were paid to one wrongful death beneficiary whose claims were then non-suited and who was no longer a party to the lawsuit at the time of submission to the jury. However, the settlement proceeds were shared by the other plaintiffs who ultimately secured a verdict against the non-settling Defendants. In this case, the Supreme Court held that there is a presumption that all parties benefited by the settlement with the non-suiting

plaintiff and the entirety of the settlement paid to the non-party would be the amount of the credit applicable. However, non-settling plaintiffs can rebut this presumption by showing they received no benefit from the settlement in question.

The decision in *Utts* contains a myriad of majority, concurring, and dissenting opinions. Some Justices conclude that the *Drilex* opinion should be overruled. Three Justices conclude that the *Drilex* opinion should have been applied without regard to whether the settling Plaintiff was a party to the lawsuit or not. Some Justices distinguished *Drilex* from the facts in the *Utts* case.

Under the 1995 amendments, if settling plaintiffs remain in a lawsuit involving derivative action claims, then it appears the majority of the Supreme Court will apply the *Drilex* rules and reduce the jury award by the amounts of monies paid to any and all Plaintiffs. If the settling plaintiffs are no longer parties, then there is a presumption that all remaining plaintiffs received benefits from the settlement and all should be burdened with the settlement credit. However, that presumption can be overcome by a showing that the non-settling plaintiff received no benefit from the settlement in question.

The 2003 legislative changes to the definition of "Claimant" may have the effect of codifying the *Drilex* rules for application of settlement credits both where the settling plaintiffs remain as parties and in the *Utts* situation where the settling plaintiffs no longer remain as parties at the time of submission.

Under the 2003 amendments, a "Claimant . . . includes . . . any person who is seeking, has sought, or could seek recovery of damages. . .", TEX. CIV. PRAC. & REM. CODE §33.011(1)(B) as amended by House Bill 4. The Legislature has clearly included within the definition of claimant parties who in the past have sought, but are no longer a party at the time of submission. The Legislature also includes persons who "could seek" but presumably have not. We suspect this language was included to insure a credit is given for any presuit settlement that is reached with any of the claimants who never actually became plaintiffs in a lawsuit.

While the definition of "claimant" in the 2003 amendments codified *Drilex*, the change is irrelevant because the settlement credit – in most cases under the 2003 amendments – is based on the percentage of the settling person's fault. However, the *Drilex* rules remain in health care liability cases where the defendants elect a dollar-for-dollar settlement credit, as well as in non-health care liability cases filed or tried on or after June 9, 2005 for which the dollar-for-dollar settlement credit has been re-established.

In summary, when operating under the 1995 amendments, it appears that *Utts* and *Drilex* will provide the rules for application of settlement credits. Under the 2003 amendments, courts will most likely determine that the *Drilex* method for applying settlement credit will apply in all health care liability cases where a dollar-for-dollar credit is elected. This includes cases where: settling parties remain as plaintiffs; settling parties never became plaintiffs; and settling parties were once plaintiffs but non-suited their claims.

Operation of the *Drilex* rules in applying the settlement credit presents potentially significant problems to plaintiffs with derivative claims. These problems are perhaps at their worst when multiple plaintiffs hire separate lawyers to represent them in claims arising out of a single death or injury. Under the *Drilex* rules, one group of plaintiffs could settle and burden the remaining plaintiffs with a credit when those plaintiffs received no benefit from the settlement.

Further, agreeing to a partial settlement may cause some plaintiffs to have their jury award reduced by a great deal and others reduced by a smaller amount. The reason for this issue is that the reduction as between plaintiffs is not dependent upon the amounts those plaintiffs receive from a partial settlement, but rather is dependent upon the amount of money that the plaintiffs are awarded by the jury. Plaintiff lawyers should disclose the effects of the *Drilex* rules and obtain consent to enter into partial settlements in these types of cases.

H. Circular Indemnity

A problem that can arise with indemnity is circular indemnity which can defeat a plaintiff's attempt to collect any damages. In *Martinez v. Gulf States Utility Co.*, 864 S.W.2d 802 (Tex. App. - Houston [14th Dist.] 1993, pet. denied), the plaintiff settled with two of the three defendants and indemnified the two settling defendants "from any liability for any cross actions seeking contribution and indemnity." Gulf States, the remaining defendant, then moved for summary judgment on the basis that it was owed statutory indemnity by the settling defendants. Gulf States argued "that the suit against it was extinguished because anything that would be paid by them could be recovered, by statute, from [the settling defendants] which, in turn, could recover from appellants by contract." *Martinez*, 864 S.W.2d at 803. The court first rejected the plaintiff's claims that the statutory indemnity was inapplicable; they ruled that the express negligence test was met by the language quoted above. The resulting circular indemnity defeated the plaintiff's claims against Gulf States.

I. Proof Problems Associated with the Settlement Credit

The Court's opinion in *Foust v. Estate of Walters*, 21 S.W.3d 495 (Tex. App. - San Antonio 2000, pet. denied) demonstrates an evidentiary problem with settlement and the amount of the credit. In *Foust*, the evidence showed that a codefendant forgave approximately \$14,000 in debt owed by plaintiff, and plaintiff subsequently non-suited the codefendant. Nevertheless, the court held that the litigating defendant failed to prove that the debt forgiveness was a settlement subject to credit. The court found there was no settlement agreement, the codefendant did not obtain a release for plaintiff's claims (only a non-suit without prejudice), and the debt forgiveness was at least superficially a unilateral act on the codefendant's part.

IV. RECENT CASES

The last two years have seen significant developments in Texas case law on proportionate responsibility. Among other things, the Texas Supreme Court and the appellate courts decided important issues relating to:

- Whether a breach of implied warranty claim is a "cause of action based on tort;"
- Claims under the Dram Shop Act;
- Allocating a settlement credit between separate and joint damages;
- Whether funds tendered to a Bankruptcy Court render a bankrupt party a "settling person;" and
- Designation of Responsible Third Parties.

Below, we discuss these recent cases.

A. Breach of Implied Warranty Claims

After a city jail inmate committed suicide by using a telephone cord to hang himself, the representative of the inmate's estate and others brought an action against the city and the electronics corporation that installed the telephones in the jails cells claiming negligence, strict liability, misrepresentation, and breach of express and implied warranties. *JCW Electronics, Inc. v. Garza*, 257 S.W.3d 701, 702-03 (Tex. 2008). The jury attributed sixty percent of the liability to the deceased inmate. *Id.* at 703. The defendants unsuccessfully argued that the sixty percent liability finding barred the decedent's estate from recovering on all pleaded claims under Chapter 33. *Id.* The appellate court affirmed the jury's finding on breach of implied warranty, holding that under the 1995 amendments, Chapter 33 did not apply to a claim for breach of implied warranty. *Id.* Overruling the appellate court, the Texas Supreme

Court held that Chapter 33 was applicable because under Texas law, "implied warranties are created by operation of law and are grounded more in tort than in contract." *Id.* at 704-05. In addition, the Court found that as Chapter 33 applies to product liability claims, it also follows that it applies to implied warranties because a claim for implied warranty is one basis for a products liability claim. *Id.* at 705 (citing TEX. CIV. PRAC. & REM. CODE. § 82.001(2) (providing that a products liability claim for personal injury, death, or property damage is based in strict tort liability, negligence, misrepresentation, and breach of express or implied warranty)). Having concluded that Chapter 33 applied to implied warranty claims, the Court concluded that the deceased inmate's estate was barred from recovering under the breach of implied warranty and other claims because his percentage of responsibility was greater than fifty percent.

B. Claims Under the Dram Shop Act

Members of the Duenez family filed suit under the Texas Dram Shop Act after they were injured in a collision with a drunk driver who purchased alcoholic beverages from a convenience store. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007). The plaintiffs' originally sued, among others, the owner of the convenience store, the store clerk who sold the alcohol, and the patron. *Id.* The owner of the convenient store filed a cross-claim against the patron, naming him as a responsible third party and a contribution defendant. *Id.* at 682-83. The trial court ruled that Chapter 33 did not apply to the case, severed the convenience store owner's claims against the patron, and refused to submit any questions to the jury regarding the patron's responsibility or the proportionate responsibility between the patron and the convenience store owner. The appellate court affirmed the trial court's rulings, finding the convenience store owner "vicariously liable for the damages caused by an intoxicated person." *Id.* at 683. The Texas Supreme Court overruled the appellate court, distinguishing dram shop liability from negligent entrustment and negligent hiring cases, and held that an alcohol consuming "patron is not the agent or employee of a dram shop, that the provider has no control or right to control the patron, and that the patron's actions causing the accident are not in furtherance of the provider's business." Thus, under the Texas Dram Shop Act, the name of the alcohol consuming patron should be submitted along with the alcohol provider to the jury for proper assessment of responsibility.

C. Allocating a Settlement Credit Between Separate and Joint Damages

In *Galle*, plaintiff homeowners brought an action against their insurance company and a mold remediation company, Galle. *Galle, Inc. v. Pool*, 262 S.W.3d 564 (Tex. App. - Austin Aug. 29, 2008, pet. denied). The plaintiffs settled with their insurance company before trial. After the trial court entered a judgment against Galle, it declined to apply a credit for the insurance company's settlement. *Id.* at 570. As the non-settling defendant seeking to obtain the benefit of the settlement credit, Galle had the burden of proving the settlement amount. The appellate court found that Galle "clearly met this burden" by filing a written notice advising the district court of the insurance company's settlement and attaching to the notice a copy of the settlement agreement. *Id.* at 572. In addition, Galle raised the settlement credit issue numerous additional times before, during, and after trial. *Id.* Galle having met its burden, "the burden shifted to the plaintiff to prove the extent to which the settlement amount had been allocated to separate damages paid by the insurance company, as opposed to joint or common damages." *Id.* A defendant is "entitled to a credit for any settlement amount representing joint damages, but not for any amount of separate or punitive damages paid by the settling defendant." *Id.* The court emphasized that the "plaintiff has the burden to offer evidence allocating the settlement amount between actual damages for which the settling and non-settling defendants were jointly liable, and additional damages, for which only the settling defendant was liable, in order to limit the credit to the latter." *Id.* Finding that the plaintiff failed to meet this burden, the appellate court affirmed that the district court was required to apply the full amount of the settlement credit against the jury's award against Galle. *Id.* at 573.

D. Bankruptcy Funds

Following a motor coach crash, plaintiffs brought an action against the bus owner, Central Texas Trails, the driver, Johnny Cummings, and MCI Sales and Service Inc., the company that imported, assembled, and sold the bus to Central Texas. *MCI Sales & Service, Inc. v. Hinton*, 2010 WL 513530 (Tex. 2010). Two months after the accident, Central Texas filed for Chapter 11 bankruptcy protection; Cummings filed a Chapter 7 bankruptcy petition shortly thereafter. The bankruptcy court ordered Central Texas' liability insurer to pay its \$5 million policy limits into the bankruptcy court's registry. After a court ordered mediation, an apportionment schedule was created which assigned a specific percentage of the insurance proceeds to the plaintiffs. *Id.* Thereafter, the bankruptcy court granted a motion by the plaintiff for

an order approving the Apportionment Plan and Litigation Plan, whereby each Plaintiff's claim for a percentage of the fund was "adjudicated." *Id.*

After trial, the trial court denied MCI's request for a settlement credit for the funds Central Texas paid to the plaintiffs in the bankruptcy court. MCI appealed the issue of whether Central Texas was a "settling person" under Chapter 33. On appeal, the plaintiffs claimed that the money was tendered not to them, but to the bankruptcy court, and only because the bankruptcy court ordered it. However, the Supreme Court noted that all the parties were involved with negotiations over the \$5 million and its fair division among all the claimants and it appeared that neither Central Texas nor its insurer opposed tendering the \$5 million or participating in the apportionment proceedings. Finding that the payments to the bankruptcy court were indirect payments to the plaintiffs in consideration for Central Texas' potential liability to the plaintiffs the court also found that payment of the funds was not contingent on the outcome of an adversarial or uncertain proceeding. Furthermore, the court gave no weight to the fact that the disbursements to the plaintiffs occurred after the trial against MCI because the Chapter 33 defines a settling person as one who pays or promises to pay "at any time." Finally, the court found that the claims had not been "adjudicated" under the bankruptcy court's order, because, although "the bankruptcy court entered an order approving the Litigation Plan, that plan was prepared and agreed to by the plaintiffs." The Texas Supreme Court held that Central Texas was a "settling person" whose proportionate responsibility should be submitted to the jury.

E. Designation of Responsible Third Parties

In an unusual case involving two separate traffic accidents, the Corpus Christi Appellate Court examined whether the trial court erred in refusing to designate a responsible third party. *Texas Dept. of Public Safety v. Boswell*, No. 13-06-327-CV, 2007 WL 2471447 (Tex. App. - Corpus Christi Aug. 31, 2007, rehearing overruled April 10, 2008). The plaintiff, Boswell, was involved in a traffic accident with Sergeant Roney, a DPS officer, on February 12, 2002. *Id.* Then, on February 22, 2002, Boswell was rear-ended by Kathryn Serbanic. *Id.* Boswell sued the DPS, Roney, and Serbanic in one suit, and Serbanic settled the claims against her prior to trial. *Id.* After Boswell nonsuited Serbanic, the DPS and Roney filed for leave to designate Serbanic as a Responsible Third Party; Boswell did not object. At trial Boswell argued that because the collision in which Serbanic was involved occurred on a separate date, it was a separate cause of action and, therefore, should not be submitted

to the jury. The trial court agreed with Boswell and the DPS appealed.

Because the DPS filed its Motion for Leave to Designate Responsible Third Party well before the 60-day requirement of section 33.004(a), and Boswell did not file an objection, the appellate court found that the trial court was required to grant the leave. *Id.* at *2. To determine whether sufficient evidence was presented at trial to support the submission of Serbanic as a responsible third party, the appellate court noted: Boswell initially sued for both accidents in one lawsuit, claiming his injuries and damages might be indivisible; Boswell opposed Serbanic's motion to sever; arguing and presenting evidence that he suffered an indivisible injury and "would be prejudiced if required to maintain two lawsuits." *Id.* at *3-5. Finding that there was sufficient evidence to support the submission of Serbanic as a responsible third party, the appellate court reversed the trial court's decision and remanded the case. The appellate court did not reach the DPS' alternative point of error regarding the trial court's denial of DPS' motion to submit Serbanic's negligence to the jury as a settling person. *Id.* at *5.

The San Antonio Court of Appeals considered the question of whether, under Section 33.004(e) of the Texas Civil Practice & Remedies Code, the sixty day time period in which a claimant may join a responsible third party into a lawsuit begins at the time a party files a motion for leave to designate a responsible third party or at the time the court grants the motion. *Valverde v. Biela's Glass & Aluminum Prod., Inc.*, 293 S.W.3d 751, 754-55 (Tex. App.—San Antonio 2009, no pet. h.). Finding that Section 33.004 requires an order granting a motion for leave in order to designate a responsible third party, the Court held that the claimant's sixty day time period begins on the date the order is signed. *Id.* at 756. This ruling highlights the importance of seeking an order on a motion for leave to designate a responsible third party, even in circumstances where no objection is filed.

In *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009), the Texas Supreme Court held that Section 33.004(e) of the Texas Civil Practice & Remedies Code does not operate to revive a claim otherwise barred by a statute of repose, as distinguished from a statute of limitations.

In *Fisher, et al. v. Haliburton, et al.*, Nos. H-05-1731, H-06-1168, H-06-1971, 2009 WL 1098457 (S.D. Tex. 2009), the Court reviewed the defendants' motion for leave to designate responsible third parties, including: the United States by virtue of the actions of the United States Army and certain named insurgent forces, including Al Qaeda. The Court denied leave to designate the United States based on the political question doctrine. *Id.* at *2. The Court held that the political question doctrine speaks to a court's ability to

identify a duty owed, determine a breach, and mold a partition for the right; accordingly, the fact that the United States would not actually be joined as a party was not relevant. *Id.* The Court granted the defendants' leave to designate the named insurgent forces as responsible third parties, holding that identifiable groups, such as Al Qaeda, fall within the definition of a responsible third party. *Id.* at *3-4. Additionally, the 2003 amendments to the statute eliminated the need for a court to have jurisdiction over a proposed third party. *Id.* at *4.

In *Flack v. Hanke*, 2010 WL 3993941 (Tex. App.—San Antonio 2009, pet. filed), the Court recognized that the Section 33.004(e) of the Texas Civil Practice & Remedies Code allows a plaintiff to sue a defendant with little or no liability, and that defendant may then designate the true tortfeasor, otherwise protected by a limitations defense, as a responsible third party. The plaintiff can subsequently join the true tortfeasor, avoid a limitations defense, and nonsuit the original defendant. In *Flack*, the plaintiff and original defendant's settlement agreement included the defendant's promise to designate a responsible third party. However, the Court held that the designation was proper because nothing in Chapter 33 precludes a party from being both a defendant and a settling person. *See also Villarreal v. Wells Fargo Brokerage Services, LLC*, S.W.3d , 2010 WL 1053205 (Tex. App.—Houston March 11, 2010, no pet. h.) (holding that Chapter 33 permits the joinder of a responsibility third party which had a valid limitations defense at the time the suit was filed; however, claims which were time barred prior to the 2003 amendments to Chapter 33 cannot be revived pursuant to section 33.004(e)).

In *Coachmen Industries, Inc. v. Alternative Service Concepts L.L.C., et al.*, No. H-06-0892, 2008 WL 2787310 (S.D. Tex 2008), the Court held that once leave has been granted to designate a responsible third party, that designated party is available for apportionment of fault by any defendant, provided that the harm alleged by the non-moving defendant is supported by the evidence provided by the moving defendant.

F. Chapter 33 and Vicarious Liability

Texas courts have held that in matters involving only ordinary negligence (as opposed to gross negligence), a direct liability claim and a claim resulting in vicarious liability under *respondeat superior* can be mutually exclusive modes of recovery. *See Estate of Arrington*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.). This occurs when a plaintiff pleads ordinary negligence against an employer and employee, and the employer's liability for its employee's negligence acts has been established

through a stipulation of vicarious liability. *Id.* In *Williams v McCollister*, 671 F. Supp.2d 884 (S.D. Tex. 2009), the Court held that Chapter 33 of the Texas Civil Practice and Remedies Code does not affect the legal principles set forth in *Estate of Arrington*. Although derivative claims such as negligent hiring involve distinct acts of negligence on the part of the employer, the employer's liability for these acts is entirely dependent for causation upon the negligent acts of the employee. *Id.* at *6. Accordingly, negligent hiring claims are similar to claims based on vicarious liability and are excluded from Chapter 33's apportionment scheme. *Id.* This means that the jury will not apportion fault to both an employee and the employer in the above describe situation. Rather, the jury will only apportion fault among those directly liable for the incident, and the employer will be liable for the amount of fault apportioned to the employee. *Id.*

G. Applying Sections 41.0105 and 33.012 of the CPRC

In *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926 (Tex. App.—Dallas, pet. denied), the Court considered the interplay between Sections 41.0105 and 33.012 of the Texas Civil Practice & Remedies Code. Section 41.0105 limits the *recovery* of damages based on a determination of the amount actually paid or incurred by or on behalf of the claimant, and operates in addition to any other limitation under the law. *See* TEX. CIV. PRAC. & REM. CODE § 41.0105. In contrast, section 33.012 requires the court to reduce the *amount of damages to be recovered* by the plaintiff's percentage of responsibility. *See* TEX. CIV. PRAC. & REM. CODE § 33.012. In *Brown*, the Court held that section 41.0105 must be applied after all other calculations limiting or reducing the amount of recoverable damages, including section 33.012. *Id.* at 931. If the resulting damage amount based on reasonable and necessary medical expenses is greater than the amount of medical expenses actually paid or incurred, then section 41.0105 further limits the claimant's recovery to the lesser amount. *Id.* However, if the resulting damage amount is not greater than the amount actually paid or incurred, then section 41.0105's limitation is satisfied and no further reduction in the amount of those damages recoverable is necessary. *Id.*

H. Section 33.004(e) and Health Care Liability Claims

The Texas Supreme Court has granted review of *Molinet v. Kimbrell, et al.*, 288 S.W.3d 464 (Tex. App.—San Antonio 2009, pet. granted). The issue on appeal is whether the two year statute of limitations for health care liability claims contained in TEX. CIV.

PRAC. & REM. CODE § 74.251, which begins "notwithstanding any other law," trumps the statute of limitations loophole in Section 33.004(e). The parties have filed their briefs but the date for oral argument has not been set yet.

V. CONCLUSION

Proportionate responsibility law in Texas is one of the most complex areas of personal injury practice. In any multiple party case, the Plaintiffs and Defendants must consider the implications of proportionate responsibility from their initial pleadings, to settlement, and finally through the entry of judgment. These complex laws require a practitioner to study and to analyze carefully the application of these laws to the facts of each individual case.