

# **Legal Update '08: Proportionate Responsibility, Settlement Credits, and Other Fun Stuff**

*presented by*

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## **Biographical Information**

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## **Education**

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## **Selected Experience**

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Tort Litigation and Insurance Section Head, 2006-present  
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Diverse Insurance Defense Practice Including: Products Liability, Premises Liability, Auto/Trucking Litigation, Professional Liability (Legal Malpractice Defense), Subrogation; Commercial Litigation; and Employment Litigation

**Proportionate Responsibility — Historical Overview**

Most of the rules pertinent to our subject matter can be found in Chapter 33 of the Texas Civil Practice and Remedies Code, which I will refer to as “Chapter 33” throughout this presentation.

Chapter 33 was substantially amended in 1995 and in 2003, both in legislative packages labeled as “tort reform” measures. The 2003 amendments apply to all cases filed on or after July 1, 2003, so they apply to most of the cases still in the judicial pipeline.

Texas law regarding comparative negligence has continually evolved over the decades. The evolution has involved several trends:

<i>Old Rule</i>	<i>Trend</i>
1. A claimant’s contributory negligence was a complete bar to recovery.	1. A claimant’s contributory negligence should generally result in only a proportionate reduction of recovery.
2. Comparative fault applied only to negligence; different theories of liability could not be compared.	2. All types of tortious conduct should be compared to each other in a single proportionate-responsibility finding.
3. Liable defendants were generally jointly and severally liable.	3. Joint and several liability should be the exception rather than the rule.
4. Defendants could not reduce their liability by pointing the finger at a tortfeasor that the plaintiff had not sued (and perhaps could not sue).	4. The fact-finder should consider all possible tortfeasors when assessing comparative fault, whether they have been sued by the plaintiff or not.

**Effects of Plaintiff’s Responsibility**

Two effects flow from a fact finding that a plaintiff’s own tortious conduct caused his own injuries:

1. The plaintiff’s maximum “amount of recovery” is reduced proportionately.
2. The plaintiff is completely barred from recovery if his percentage of responsibility exceeds:

\_\_\_\_\_ %.

**“Amount of recovery” and “Amount of liability”**

“**Amount of recovery**” is the maximum amount that a given plaintiff can recover for his injury or loss from all of the defendants in the case. § 33.012; *Roberts v. Williamson*, 111 S.W.3d 113, 123 (Tex. 2003) (“Section 33.012 controls the claimant’s total recovery[.]”).

“**Amount of liability**” is the amount that a given defendant will be assessed in the judgment as its liability to the plaintiff. § 33.013; *Roberts v. Williamson*, 111 S.W.3d 113, 123 (Tex. 2003) (“[S]ection 33.013 governs the defendant’s separate liability[.]”).

**What is the plaintiff’s “amount of recovery”?**

This is calculated using the following formula:

$$\begin{array}{r} \text{_____} \\ \text{minus} \\ [ \text{_____} \text{---} \text{_____} ] \quad + \\ \text{_____} \\ \text{equals} \\ \text{Plaintiff’s “amount of recovery”} \end{array}$$

**What is the defendant’s “amount of liability”?**

**General rule:** A defendant is liable only for its percentage of responsibility times the amount of damages found by the trier of fact. § 33.013(a).

**Exception:** A defendant is jointly and severally liable if its responsibility exceeds \_\_\_\_\_%, or if the defendant is found liable for certain intentional torts and did so in concert with another person. § 33.013(b).

“**Joint and several liability**” means that the defendant is liable to the plaintiff for the plaintiff’s entire “**amount of recovery**” as calculated under § 33.012.

**<2003:** Formerly, a defendant was also jointly and severally liable if (1) the defendant’s percentage of responsibility was 15% or more, *and* (2) the harm at issue was caused by a “toxic tort” or the discharge into the environment of a hazardous or harmful substance.

>2003:

The Legislature repealed all special rules relating to toxic torts and environmental releases. Such cases now fall within the general rules governing joint and several liability.

## Calculating liabilities

Example: Brad Pitt is in Dallas to make a movie. He goes for an early-morning jog, and unfortunately he jogs around a corner at the very moment an Acme chemical truck crashes into a Exxon gas tanker. The resulting chemical stew sprays all over him, causing some slight damage to his exceptional good looks. He sues both Acme and Exxon under various tort theories. The jury makes the following findings:

Acme: 80% responsible  
Exxon: 20% responsible  
damages: \$100,000

*What are the defendants' respective liabilities?*

Old rule:

Acme: \$ \_\_\_\_\_

Exxon: \$ \_\_\_\_\_

New rule:

Acme: \$ \_\_\_\_\_

Exxon: \$ \_\_\_\_\_

## Settlement Credits — General Rule

The Texas Legislature changed the settlement-credit rules in 2003 and then again in 2005. Basically, it accidentally repealed the old dollar-for-dollar credit for most cases in 2003. The Legislature restored the dollar-for-dollar credit in 2005, and took the unusual step of making that restoration effective even for pending cases that go to trial on or after June 9, 2005.

<2003: Non-settling defendants could elect between (1) a dollar-for-dollar credit based on the total of the amounts received by the plaintiff in settlement of its claims, and (2) a “sliding-scale” credit based on a percentage of the total amount of damages **found by the trier of fact** (regardless of the amount of settlement dollars paid).

2003-2005: The old credits were abolished, and there was no longer an election available to defendants except in medical-malpractice cases. Instead, defendants were entitled only to a settlement credit equivalent to the percentage of responsibility, if any, assessed against the settling person(s).

>2005: The dollar-for-dollar credit has been restored for all tort cases and is now the only credit available in non-medical-malpractice cases. Med-mal defendants can elect between dollar-for-dollar credit and a settlor’s-percentage-based credit. § 33.012.

Remember: The settlement credit is applied directly to the jury’s damages award for purposes of calculating the plaintiff’s maximum **amount of recovery**.

Examples: P is injured and sues alleged joint tortfeasors D and S. S settles with P for **\$500**. The case goes to trial on or after July 9, 2005 and the jury finds **\$1000** in damages. What is D’s liability under the following allocations of responsibility?

D: 20%

S: 80%

Answer:\_\_\_\_\_

D: 60%

S: 40%

Answer:\_\_\_\_\_

D: 100%

S: 0%

Answer:\_\_\_\_\_

### Settlement credits: An unexpected result?

When a defendant is not held jointly and severally liable—when its percentage of responsibility is 50% or less—it may be surprised to get less help from the settlement credit than it expects, or even no help at all.

*Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003).

The Williamsons sued Dr. Roberts and Laird Memorial Hospital for negligence, alleging injuries to their newborn daughter. The Hospital settled before trial for \$468,750. The Williamsons went to trial against Dr. Roberts, and the jury found Dr. Roberts liable. It made the following findings of proportionate responsibility and damages:

Dr. Roberts: 15% responsible

Hospital: 85% responsible

Damages: \$3,000,000

The trial court entered judgment against Dr. Roberts for \$450,000, or 15% of the whole \$3 million damages finding. Was this correct? What about the settlement credit?

The supreme court held that the trial court did it right, rejecting Dr. Roberts's argument that the trial court should have first subtracted the settlement from the damages, then multiplied by his 15% of responsibility. Chapter 33 is actually quite clear: a defendant that is not jointly and severally liable should be held liable for its percentage of responsibility times the total damages found by the jury. Only if that number exceeds the plaintiff's maximum permitted **amount of recovery** [(damages found by the jury) – (plaintiff's percentage of responsibility + settlement credit)] does the defendant get any extra benefit from the settlement credit.

## **Settlement Credits — A Trap for the Unwary?**

Every once in a while, a defendant will get bitten when it relies on a “united front” defense with its co-defendants and assumes that the settlement-credit rules will take care of everything if its co-defendants settle out of the case late.

This is not necessarily true if a plaintiff settles with a co-defendant right before trial—especially if that settlement is pretty low.

The settling co-defendant could disappear from the case, leaving your insured to soak up lots and lots of percentage points of responsibility, getting only a meager dollar-for-dollar settlement credit in offset.

### **Discussion Question**

How can you protect yourself against the late-settling co-defendant without unnecessarily rocking the boat during discovery?

**What in the world is a “Responsible Third Party”?**

Generally, a “responsible third party” is someone that arguably contributed to cause the plaintiff’s injuries and that the plaintiff for some reason has neither sued nor settled with.

Who are people that defendants would typically need to make responsible third parties?

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The responsible third party at work:

- 1. Plaintiff: 20%  
Defendant: 30%  
RTP: 50%

Damages: \$1000

Defendant’s liability? \$\_\_\_\_\_

- 2. Plaintiff: 20%  
Defendant: 60%  
RTP: 20%

Damages: \$1000

Defendant’s liability? \$\_\_\_\_\_

**Comparison of Settlement Credits and Responsible Third Parties  
when the Defendant is held Jointly and Severally Liable**

New rule: The new general rule regarding settlement credits creates an interesting distinction between the usefulness of settling persons as compared to responsible third parties. Both are submitted in the jury charge as “empty chairs.” Both can help the defendants avoid joint-and-several liability by absorbing percentages of responsibility. But only the settling person gives the defendant an actual credit if the defendant is held jointly and severally liable.

Example: Assume a tort case goes to trial against a single defendant. There is one other alleged joint tortfeasor, but he is not a defendant; he either settles for \$500 or he is a responsible third party. The jury returns the following findings:

D:                   60%  
S/RTP:           40%  
damages:       \$1000

*What is D’s liability in the judgment?*

Defendant is jointly and severally liable, and therefore must pay the plaintiff’s entire **amount of recovery**. (damages found by the jury) – (plaintiff’s percentage + settlement credit) = amount of recovery.

If the non-defendant is a settling person, D is liable for \$\_\_\_\_\_.  
That is, the plaintiff’s **amount of recovery** is \$500, calculated by reducing the total amount of damages (\$1000) by the plaintiff’s percentage of responsibility (0%) and the dollar-for-dollar credit (\$500).

If the non-defendant is an RTP, however, D is liable for \$\_\_\_\_\_.  
Here, there is no settlement, so plaintiff’s **amount of recovery** is not reduced by any settlement credit, nor by any percentage of responsibility attributed to the plaintiff. D is jointly and severally liable, so he has to pay the entire **amount of recovery** — the full amount found by the jury.

## Responsible-Third-Party Practice

The 2003 amendments changed responsible-third-party practice in several significant respects that are generally quite favorable for the defense. All citations are to the amended and still current version of Chapter 33.

### “Procedural” changes:

- + The deadline for filing a motion for leave to “designate” responsible third party is now 60 days before the trial date. § 33.004(a). That time can be extended for good cause.
- + The statute of limitations is no longer an issue for the defendant seeking to designate a responsible third party. Section 33.004(d)’s 30-day deadline for adding a responsible third party against whom limitations has already run has been repealed.
- + Once the motion to designate is filed, the court “shall” grant leave to designate unless another party files an objection within 15 days after the motion to designate is served. The objecting party must “establish” that the defendant did not adequately plead the responsible third party’s responsibility under the general rules of pleading and that the defendant failed to successfully replead after being given a chance to do so. §§ 33.004(f), (g).
- + The “designation” is effective immediately upon the granting of leave, without the necessity of further action by the court or any party. § 33.004(h). Once a person is “designated” as a responsible third party, the plaintiff’s claim against that person is “revived” (if it is time-barred), and the plaintiff may “seek to join” that person regardless of limitations if it does so within 60 days after designation. § 33.004(e).
- + The statute now expressly authorizes the plaintiff to make a no-evidence challenge (via “motion to strike”) to the designation of a responsible third party. § 33.004(l).
- + The amendments clarify that the responsible third party is not really a party to the lawsuit, an issue that was unclear under the pre-2003 version of Chapter 33. *Compare Ballard v. Rubbermaid*, C.A. No. G-98-416 (S.D. Tex. April 22, 1999) with *In re Thornton*, No. 14-03-00712-CV, 2004 WL 114978 (Tex. App—Houston [14th] Jan. 26, 2004).
- First, the amendments dropped the term “join” in favor of the term “designate” throughout § 33.004.

- Second, Chapter 33 now provides expressly that neither a designation of a responsible third party nor a finding of fault against such a person can (1) by itself impose liability on the person, or (2) be used in any other proceeding to impose liability on the person through res judicata, collateral estoppel, or otherwise. § 33.004(i).

**“Substantive” changes:**

- + The definition of “responsible third party” is substantially amended to remove some prior restrictions. Specifically:
  - The rule forbidding use of workers-compensation-immune employers as responsible third parties is repealed.
  - The rule forbidding use of persons in bankruptcy and persons who have been discharged in bankruptcy is repealed.
  - The rule requiring a responsible third party to be within the personal jurisdiction of the court is repealed.
  - The rule requiring a responsible third party to be someone the “claimant” has not sued is repealed. Thus, it appears that defendants can now prophylactically designate each other as responsible third parties if they are suspicious that the plaintiff will nonsuit an insolvent defendant less than 60 days before trial.
- + The statute now expressly authorizes the use of John Doe responsible third parties if the defendant complies with the following conditions:
  - *Within 60 days of filing its original answer*, the defendant must allege in an answer that “an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit.” § 33.004(j).
  - The defendant files a motion for leave to designate the unknown person as per usual. § 33.004(j).
  - The defendant must plead facts “sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal.” § 33.004(j)(1).
  - The defendant must state in its answer “all identifying characteristics of the unknown person, known at the time of the answer.” § 33.004(j)(2).
  - The defendant’s allegations [apparently in its answer] must “satisf[y] the pleading requirements of the Texas Rules of Civil Procedure.” § 33.004(j)(3).

### **Cautionary case about the use of responsible third parties**

*In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

- + Erroneous denial of a motion for leave to designate is generally not mandamusable, distinguishing *In re Arthur Andersen, LLP*, 121 S.W.3d 471 (Tex. App.—Houston 14th 2003, orig. proceeding).
- + It is not error to deny leave to designate an unknown RTP if the motion is made more than 60 days after answering, even if the defendant did not learn about the RTP until much later on in discovery.
- + It is not error to deny leave to designate an RTP less than 60 days before trial, even if the proposed RTP is a co-defendant that the plaintiff unexpectedly nonsuits less than 60 days before trial.

One federal district court case has followed this court's analysis regarding the designation of an unknown RTP. *See Estate of Mata v. Williams*, No. V-05-57, 2007 WL 2127186 (S.D. Tex. July 23, 2007) (denying defendant's request to designate an unknown RTP because defendant failed to file an amended answer with all known identifying characteristics of the unknown person within sixty days of defendant's original answer).

### **Responsible third parties in federal court**

Does the responsible-third-party statute apply to federal cases in which Texas law provides the substantive law governing the case (typically diversity cases)?

The stronger argument is clearly that it should. The apportionment of liability in diversity cases has always been governed by state law. The availability of the responsible-third-party device is simply part of the Texas liability-apportionment scheme. Thus, federal courts should be bound to permit defendants to use responsible third parties. For good opinions reaching this conclusion, see *Becker v. Wabash Nat'l Corp.*, No. C-07-115, 2007 WL 222096 (S.D. Tex. July 31, 2007), *Muniz v. T.K. Stanley, Inc.*, No. L-06-CV-126, 2007 WL 1100466 (S.D. Tex. Apr. 11, 2007), *Cortez v. Frank's Casing Crew & Rental Tools*, No. V-05-125, 2007 WL 419371 (S.D. Tex. Feb. 2, 2007) *Werner v. KPMG LLP*, 415 F. Supp. 2d 688 (S.D. Tex. 2006), and *Bueno v. Cott Beverages, Inc.*, No. SA-04-CA-24-XR, 2005 WL 647026 (W.D. Tex. Feb. 8, 2005).

But some federal district judges have demonstrated some confusion about the nature of the responsible-third-party device and indicated their belief that responsible-third-party practice is simply a procedural device that is superseded by the contrary provisions of Federal Rule of Civil Procedure 14. *E.g.*, *Barron v. Bernal*, No. L-05-144, 2006 U.S. Dist. LEXIS 54758 (S.D. Tex. Aug. 7, 2006); *Marella v. Autozone, Inc.*, No. 3:04-CV-1157-H, 2004 WL 2847846 (N.D. Tex. Dec. 10, 2004); *Manriquez v. United States*, No. EP-03-CA-0507-DB, 2005 WL 2367783 (W.D. Tex. Oct. 28, 2005).

## Chapter 33 and statutory causes of action

Under section 33.001(a), Chapter 33 expressly applies to:

- “any cause of action based on tort”
- any action brought under the DTPA

Under section 33.001(c), Chapter 33 expressly does not apply to:

- “an action to collect workers’ compensation benefits” under the laws of Texas
- an action against an employer for exemplary damages arising out of the death of an employee
- a claim for exemplary damages within an action to which Chapter 33 otherwise applies
- a claim for damages arising from the manufacture of methamphetamine as described by Chapter 99 of the Civil Practice and Remedies Code

What about other statutory causes of action?

**Dram Shop Act liability:** Chapter 33 does apply, and any percentage of responsibility assessed against the intoxicated customer is not imputed to the dram shop. *F.F.P. Operating Partners, L.P. v. Dueñez*, 237 S.W.3d 680 (Tex. 2007). The Court held that the dram-shop defendant was entitled to make the intoxicated customer a responsible third party.

**Texas Securities Act liability (securities fraud).** Chapter 33 does not apply, and the defendant is not entitled to submit the plaintiff’s comparative negligence to the jury. *Duperier v. Tex. State Bank*, 28 S.W.3d 740, 753 (Tex. App.—Corpus Christi 2000, pet. dismiss’d by agr.).

**U.C.C. § 3.420 (bank liability for conversion of checks).** Chapter 33 does not apply, and the defendant bank cannot use the thief who stole the check as a responsible third party. *Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104 (Tex. 2004). *But see Beard v. Norwest Mortgage, Inc.*, No. 10-06-00014-CV, 2007 WL 2051854 (Tex. App.—Waco 2007, pet. denied) (noting in *dicta* that *Sw. Bank* did not involve settlement credits).

**U.C.C. implied warranty of fitness for a particular purpose.** Chapter 33 does not apply, and the defendant seller of goods cannot rely on the plaintiff’s own negligence as a defense to a breach-of-warranty claim. *JCW Elecs., Inc. v. Garza*, 176 S.W.3d 618, 632-33 (Tex. App.—Corpus Christi 2005, pet. granted). Jailhouse suicide case in which decedent was found 60% responsible, but the manufacturer of the pay phone was still held liable because the court of appeals held that Chapter 33—and the 51% bar—did not apply to the plaintiffs’ breach of warranty claim. The Texas Supreme Court has granted review of the case, and it is set for oral argument on October 18, 2007.

### The Casa Ford Problem

The 2003 tort reform did not affect the provisions of Chapter 33 relating to contribution, so *Casa Ford, Inc. v. Ford Motor Co.*, 951 S.W.2d 865 (Tex. App.—Texarkana 1997, pet. denied), remains on the books. The problematic holding of *Casa Ford* is this:

. . . Chapter 33 does not permit a tortfeasor to seek postjudgment contribution from a tortfeasor that was not a party to the judgment .

...

*Id.* at 876. The Texas Supreme Court denied petition for review in *Casa Ford*—which under Texas procedure does not convey any approval of the substance of the court of appeals’ holding—and it has never subsequently approved or disapproved that holding. Thus, a defendant is put to a difficult election when a plaintiff refuses to sue some other potentially liable joint tortfeasor—join that tortfeasor itself as a third-party defendant (undoubtedly earning that party’s hostility for the duration of the case), or opt not to implead the tortfeasor on the theory that (1) if the defendant wins the case, the issue is moot, and (2) if the defendant loses the case, it can always bring the postjudgment contribution action and argue that *Casa Ford* was wrongly decided.

Very few other courts of appeals have looked at the *Casa Ford* issue. The Dallas Court of Appeals opted to follow *Casa Ford* in a 2003 opinion. *BDO Seidman, LLP v. Bracewell & Patterson, LLP*, No. 05-02-00636-CV, 2003 WL 124829, at \*2 (Tex. App.—Dallas Jan. 16, 2003, pet. denied). *See also In re Andersen LLP*, 121 S.W.3d 471, 485 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (noting in *dicta* that a defendant “may be foreclosed” from obtaining contribution from third parties when trial court denies motion for leave to designate RTP). The Beaumont Court of Appeals, on the other hand, recently held that *Casa Ford* was wrongly decided in *In re Martin*, 147 S.W.3d 453, 459-60 (Tex. App.—Beaumont 2004, orig. proceeding). The question remains open....