

**RUNNING AN OLYMPIAN GAUNTLET:
THE CHAPTER 33 DECATHLON**

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CHAPTER 19

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PROFESSIONAL ACTIVITIES:

Argued case on HMO liability to U.S. Supreme Court in March, 2004: *CIGNA HealthCare of Texas, Inc. v. Calad* (No. 03-83); *Aetna Health Inc. v. Davila* (No. 02-1845) [consolidated].

Successful Appellate counsel in the following selected appeals, among others: *Hartman v. St. Paul Fire & Marine Ins. Co.*, 95 F.3d 1149 (5th Cir. 1996); *Hamman v. Southwestern Gas Pipeline*, 832 F.2d 55 (5th Cir. 1987); *Giles v. NYLCare*, 172 F.3d 332 (5th Cir. 1999); *Calad v. CIGNA Healthcare of Texas, Inc./Davila v. Aetna U.S. Healthcare*, 307 F.2d 298 (5th Cir. 2002) *rev'd on appeal*; Special Counsel to Attorney General, *Corporate Health Ins., Inc. v. Texas Department of Ins.*, 12 F.Supp.2d 597 (S.D. Tex. 1998), *aff'd in part, rev'd in part*, 215 F.3d 526 (5th Cir.), *rehearing denied*, 220 F.3d 641 (5th Cir. 2000) (Aetna's unsuccessful declaratory judgment action to declare Texas HMO liability statute preempted by ERISA).

Adjunct Professor: Texas Wesleyan School of Law: Texas Trials and Appeals, Fall 1995; Fall 1996; Fall 1997

Guest lecturer at University of Texas School of Law Insurance Class (contact: Phil Maxwell); guest lecturer at Texas Wesleyan School of Law

Finalist, 2003 Trial Lawyer of the Year; *Trial Lawyers for Public Justice* (for work done on *Pybas* case; one of eight cases nominated nationally)

2003, 2004, 2005 and 2008 Texas "Super Lawyers" selected by *Texas Monthly* (only 5% of all Texas lawyers)

"Top Attorneys in Tarrant County" by the *Fort Worth Business Press*; "Top Attorneys in Tarrant County" by *Fort Worth Magazine*

Numerous successful jury trials.

SELECTED SEMINARS AND PAPERS:

April 2008: Co-Author, "An Intersection or the End of the Road? The Impact of Chapter 33 on Indemnity in Texas," Texas College for Judicial Studies Conference

Sept 2007: Co-Author, "Indemnity, Immunity and Responsible Parties," 2007 Judicial Section Annual Conference, Texas Center For the Judiciary

Fall 2007: Co-Author, "An Annotated 'Model' Settlement Agreement," The Advocate, State Bar of Texas Litigation Section

Aug 2007: Co-Author, "Chapter 33 and "Indemnity," 30th Annual Advanced Civil Trial Course, State Bar of Texas

April 2007: Co-Author, "Chapter 33: Immunity, Indemnity and Other Emerging Issues," Texas College for Judicial Studies

Feb 2007: Co-Author, "Chapter 33: Proportionate Responsibility and Other Frights," 23rd Annual Litigation Update, Texas Bar CLE

Aug 2006: Co-Author, "Chapter 33: Proportionate Responsibility and Other Frights," 29th Advanced Civil Trial Course

Aug 2005: Co-Author, "Chapter 33: One Need Not Be A Party to be Invited to the Party (A Wake for 'Joint and Several Liability' and the Retreat from 'Broad Form Submission' in Texas)," State Bar of Texas 28th Annual Advanced Civil Trial Course

Sep 2004: Co-Author, "Preparing to Take Depositions," and "Taking Depositions," STATE BAR OF TEXAS LITIGATION SECTION MAGAZINE

Jun 2004: Academy Health Annual Research Meeting: Speaker: "A Quiet Revolution: Role of the Courts in Health Care Systems Change"

Sep 2003: American Conference Institute: "The Most Common Causes of Action Today . . . And the Latest Strategies for Defending Them"

Sep 2003: Mealey's Bad Faith: "Potential Liability Arising from Class Actions"

Sep 2002: 13th Annual Medical Malpractice Conference

Nov 2002: Advanced Expert Witness Course III: "The Expert on HMO Liability"

Nov 2002: HMO and Managed Care Law Seminar

May 2002: Crittenden Medical Insurance Conference

Oct 2002: State Bar of Texas' HMO and Managed Care Law: "HMO Liability to Patients: 10 Tips for Plaintiffs and 12 Tricks by Defendants in Chapter 88 HMO Liability Cases"

Apr 2001: Co-Author, "Recent Decisions Illustrate ERISA Preemption Morass," *Texas Lawyer*

Aug 2000: Author, "ERISA Federal Preemption of HMO Lawsuits: New Case Law," *Health Plan & Provider Report*, Vol. 6, No. 32, pp. 979-991

Sep 2002: Texas Trial Lawyers Association Medical Malpractice Conference: "Few Cases and a Big Hammer – The HMO Liability Statute Works: Eight Essentials for Successful HMO Liability Claim"

Sep 2000: 4th Annual Conference on Suing and Defending Managed Health Care Providers: "Managed Care Liability Update"

Sep 2000: TMA Summit Advocacy, Policy, Professionalism: "Managed Care, Physician Negotiation and Anti-Trust Legislation Update"

May 2000: State Bar of Texas' Advanced Commercial and Consumer Law Course: "Making Healthcare Claims Work"

Nov 1999: Texas Hospital Association: "HMO Liability and Case Law Update"

Sep 1999: Texas Trial Lawyers Association's Tenth Annual Advanced Medical Malpractice Conference

Sep 1999: UT School of Law's Third Annual Conference on Suing and Defending Managed Health Care Providers

Mar 1999: Mealey's HMO Liability Conference

Mar 1999: State Bar of Texas' Sixth Annual Advanced Medical Malpractice Course

Jan 1998: State Bar of Texas Advanced Health Law 1998: "HMO Liability"

Jan 1998: State Bar of Texas 14th Annual Litigation Update Institute: "HMO Update"

Oct 1997: UT School of Law Institute: "Litigation Involving Managed Health Care Providers"

Sep 1997: UT School of Law Managed Care Litigation Conference: "Litigation Involving HMOs"

Sep 1997: Texas Trial Lawyers Association: "Beware of ERISA When Using the New HMO Liability Law"

Sep 1997: Author, "Don't Preempt the HMO Liability Bill," *Texas Lawyer*

Jan 1997: Author, Op-Ed Piece in View Points, Dallas Morning News: "Let's Rein in Health Maintenance Organizations"

OTHER PROFESSIONAL:

Numerous interviews to media on various issues, including ABC Evening News, NBC Nightly News, CBS News, *PrimeTime Live*, CNN, Good Morning America, Today Show, *NPR*, *Business Week*, *Solon Magazine*, *Dallas Morning News*, *LA Times*, *New York Times*, *Washington Post*, *Austin American Statesman*, *Fort Worth Star Telegram*, *Fort Worth Business Press*, *Texas Lawyer* and various other newspapers across the country.

Board Certified – Civil Trial Law, Texas Board of Legal Specialization.

Director, Texas Trial Lawyers Association 2000-2001, Director Emeritus 2002-2004; Member, District 7A Grievance Committee, 1994 to 1997; 1995 to 1996 Chair: Professional Enhancement Program; Secretary, Consumer Law Section, State Bar of Texas: 1992 to 1994 (Council member 1988 to 1994).

SERVICE:

Board of Directors Executive Committee and V.P. for Development, Camp Fire USA First Texas Council; Executive Committee of the Board of Trustees at Southwestern University 1997 to Spring 2003; Board of Trustees, Southwestern University 1996 to Spring 2003; Texas Lyceum 1989-1995; Tarrant County Co-Chair, Caring for Children; Volunteer pro bono legal work for various charitable and arts organizations; 1988-89 Class of Leadership Fort Worth.

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Professional Background

Kendyl Hanks is an associate with Haynes and Boone's Appellate Practice Group. Kendyl has experience in all aspects of trial and appellate practice, including dispositive motions, preparation of the jury charge, preservation of error, post-trial motions pertaining to judgment formation, J.N.O.V and new trial, and briefs and oral argument to state and federal trial and appellate courts. In 2006 she was named one of the "*Best Lawyers Under 40*" in Dallas by D Magazine, and in both 2005 and 2006 she was named as a "*Rising Star*" among Texas lawyers in the practice of appellate law by Texas Monthly's Texas Super Lawyer, Rising Stars Edition. Kendyl moved to New York in 2005, where she practices appellate law and complex business litigation in Texas and New York out of Haynes and Boone's New York office. She is admitted to practice in Texas and New York, before the Second, Fifth and Sixth Circuit Courts of Appeals and the United States Supreme Court, and before the Southern, Eastern, Western and Northern District Courts in Texas, and the Southern District of New York.

Education

She received a B.A. with honors in politics from Princeton University in 1997. After a year in Washington, D.C. working for Senate Majority Leader Tom Daschle in the United States Senate and for Public Strategies Washington, she obtained her law degree from the University of Texas at Austin in 2001. While in law school, she was a Notes Editor on the Volume 79 Editorial Board of the *Texas Law Review*, a member of the *Order of Barristers* (recognizing each graduating class's top ten advocates), a recipient of the *Peregrinus Consul Award*, and a national finalist and top brief-writer/oral advocate in the American Bar Association Moot Court competition. She also served as an intern for then-Supreme Court Justice Greg Abbott.

Selected Professional and Community Leadership

American Bar Association: *Nominee to the ABA Board of Governors* (2008-2009); ABA Section of Business Law: *Chair, Appellate Subcommittee* (2004-2008); *Business Law Fellow* (2006-2008); ABA Young Lawyers Division: *Leadership Advisory Board* (2007-2009), *Meetings Coordinator* (2007-2008); *Communications Director* (2006-2007) and *District Representative* (2005-2006); Travis County Women Lawyers Association, *Pro Bono Award* (2004); Texas Young Lawyers Association, *President's Award of Merit* (2006 and 2007).

Selected Publications

- *Chair and Moderator*, "Wingman or Backseat Driver: Retaining Appellate Counsel to Maximize 'Mission Critical' Business Litigation Strategies," ABA Section of Business Law Committee Meeting, Washington, D.C., November 16, 2007.
- *Author*, "Obtaining and Challenging Supersedeas Bonds: New Procedures and Problems," Texas Young Lawyers Association eNews, September 2007.
- *Author and Presenter*, "Chapter 33: Responsible Third Parties: Litigating the Musical Chair," Presented at the Texas Advanced Civil Trial Courses 2007.
- *Chair, Author and Moderator*, "A Tour of The Ivory Tower: Developments in the United States Supreme Court That Every Business Lawyer (and Client) Should Know About," ABA Section of Business Law, Appellate Subcommittee Forum, Washington, D.C., March 16, 2007.
- *Author*, "U.S. Supreme Court Update: *Philip Morris v. Williams*—Further Defining the Constitutional Limits on Punitive Damages; and *Massachusetts v. Environmental Protection Agency*—The Supreme Court Faces an Inconvenient Truth?," TYLA eNews, May 2007.

- *Co-Author and Presenter*, “Chapter 33: Proportionate Responsibility and Other Frights,” and “Chapter 33: One Need Not Be a Party to Be Invited to the Party,” Presented at the Texas Advanced Civil Trial Courses 2005 and 2006.
- *Presenter*, “Enforcing Forum Selection Clauses in Federal Court,” Presented to the Federal Bar Association and DBA Business Litigation Section, 2005.
- *Author*, “Apportionment of Liability Under Chapter 33,” Fall 2004 Issue of *The Appellate Advocate, State Bar of Texas Appellate Section Report*.
- *Co-Author and Presenter*, “*Formation of the Judgment and Calculation of Interest*,” Presented at the 14th Annual Conference on State and Federal Appeals, June 2004.

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Josh Borsellino is an associate with Haynes and Boone's Business Litigation Section. He represents clients in all facets of commercial litigation, including matters involving fraud, breach of contract, breach of fiduciary duty, and tortious interference, as well as deceptive trade practices claims and intellectual property disputes.

JUDICIAL CLERKSHIP

Law Clerk for the Honorable Walter S. Smith, Jr., Chief United States District Judge, Western District of Texas, 2004-06

RECENT HONORS

Recognized as a "Rising Star" in the 2008 Texas Super Lawyers Rising Star Edition published by *Law & Politics* and *Texas Monthly*

EDUCATION

B.A. Southwestern University, with honors, 2001
J.D. Tulane Law School, *cum laude*, 2004

PUBLICATIONS

Co-Author, *The IP Domain*, a continuing series focusing on recent developments in intellectual property litigation, published bi-monthly in the Tarrant County Bar Association Newsletter. The following are titles of recent articles written as part of this continuing series:

- *Czars and Stripes: Everything You Need to Know about the PRO-IP Act*
- *Memories...of the way we were – Protectable Trade Secrets?*
- *Trademark Lawsuits: The New "It" Accessory*
- *Click. Download. Go to Jail?*
- *When is \$200 Million Not Enough? Alleged Copyright Infringers Beware.*
- *XM + MP3: A Formula for Copyright Infringement?*

Co-Author, *An Annotated "Model" Settlement Agreement*, published in the Fall, 2007 edition of *The Advocate*, the State Bar of Texas Litigation Section Report.

April 2007: Co-Author, *Chapter 33: Immunity, Indemnity and Other Emerging Issues*, Texas College for Judicial Studies

Feb. 2007: Co-Author, *Chapter 33: Proportionate Responsibility and Other Frights*, 23rd Annual Litigation Update, Texas Bar CLE

Aug. 2006: Co-Author, *Chapter 33: Proportionate Responsibility and Other Frights*, 29th Advanced Civil Trial Course

PROFESSIONAL ASSOCIATIONS

State Bar of Texas; American Bar Association; Tarrant County Bar Association; Tarrant County Young Lawyers' Association

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Running an Olympian Gauntlet: The Chapter 33 Decathlon

George Parker Young
Kendyl Hanks
Josh Borsellino

In many ways, Chapter 33 is a gauntlet of Olympic proportions, providing a number of traps that must carefully be considered throughout the case, from inception through appeal. With this in mind, the authors have organized a Chapter 33 decathlon to alert lawyers of ten challenges that they face in surviving this test of skill and endurance.

The first challenge in the Chapter 33 decathlon is determining whether Chapter 33 applies at all. Does it apply in so-called “mixed cases” of tort and contract or quasi-contact cases such as breach of warranty? Is the type of damages sought really a good determining factor?

The second “event” is solving the problems raised in fraud cases – if Chapter 33 applies to all tort claims, including “fraud” and “fraudulent inducement,” is a plaintiff’s contributory negligence now submitted to reduce damages from fraud? Why have courts distinguished common law and statutory fraud? Can a joint tortfeasor’s negligence be apportioned against intentional fraud?

The third challenge is the vicarious liability issue – after *Duenez* may a party request the submission of individual officers and employees of a plaintiff or a defendant as RTP’s when supported by proper motion and evidence?

The fourth challenge is the apportionment problem – what is being apportioned? Does submitting “proportionate responsibility” really mean allocating causation, damages, fault, or harm? How many apportionment questions must be submitted? How should

damages issues be tied to other parts of the charge, including the apportionment issue? How many damages questions should be submitted in light of *Romero* and *Casteel*?

The fifth challenge is determining submission issues – what is the standard for submitting a claimant, settling person or responsible third party (“RTP”) to the jury, and is it any different than other jury submissions? Is Chapter 33’s requirement that the person “caused or contributed to cause in any way” the harm of which the plaintiff complains any different than the proximate cause standard? What evidence should be introduced to support the RTP submission? Are an opponent’s current or superseded pleadings enough? What is the distinction between nonsuited and settling co-defendants? Are there special problems related to designating and submitting criminal RTPs?

The sixth hurdle is the limitations loophole and other timing traps – what are the major deadlines for Chapter 33? What is the current state of the limitations loophole in Chapter 33?

The seventh competition is resolving settlement credit issues – how does one elect them under the pre- and post-2005 Act, and how does one apply them to multiple plaintiffs and multiple defendants?

The eighth challenge is solving the riddle of contribution – when, how and against whom can one assert contribution rights, and what is the remaining scope of Chapter 32, if any?

The ninth challenge is determining the applicability of Chapter 33 in federal court. How are the federal courts treating Chapter 33 these days: procedural or substantive? What does this distinction mean for federal bankruptcy litigation?

The tenth challenge is reading the tea leaves from the Texas Supreme Court. What is the Texas Supreme Court saying these days about Chapter 33 and other “carefully constructed legislative schemes,” the UCC, the Dram Shop Act, and others? Does Chapter 33 trump statutes of limitations, and statutes of repose?

I. The Contort Problem: When is a contract claim really a tort claim (Hint: it depends on the Plaintiff!).

Chapter 33 of the Texas Civil Practice and Remedies Code apportions responsibility among those responsible for damages in “any cause of action *based on tort.*” TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1). Chapter 33 also states that it applies to “other conduct or activity that violates an *applicable legal standard.*” TEX. CIV. PRAC. & REM. CODE § 33.003(a) (emphasis added). Chapter 33 provides that applies to “any cause of action based on tort,” while Chapter 32 applies “only to tort actions.” TEX. CIV. PRAC. & REM. CODE. §§ 33.002, 32.001.

Ostensibly, Chapter 33 does not apply to contract cases. *See, e.g., Doncaster v. Hernaiz*, 161 S.W.3d 594, 604 (Tex. App.—San Antonio 2005, no pet.); *In re Kyocera Wireless Corp.*, 162 S.W.3d 758, 769 (Tex. App.—El Paso 2005, mandamus denied).

But what about cases that are not common law torts, but exhibit “tort-like” characteristics? One recent example, *Buffin v. Buckner*, involved a suit to remove a cloud on title. *Buffin v. Buckner*, 05-04-01353-CV, 2005 WL 2542564 (Tex. App.—Dallas, no pet.). The Plaintiff asserted that Chapter 33 gave her a right to recover damages, because the defendant had participated in filing a forged deed. *Id.* at *2. The appellate court held that since the suit was not one in tort or under the DTPA,

the plaintiff could not rely on Chapter 33 to support her claim for damages—even though there was a tort-like quality to the allegations. *Id.*

Ignoring Texas precedent and the central language of Chapter 33, one court has used broader language that purports to preclude application of chapter 33 to all statutory tort actions. *United States v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 773 (N.D. Tex. 2002) (stating that chapter 33 “appears to apply only to actions based on common law torts”). Another has suggested that Chapter 33 applies to “statutory tort claims that do not include a separate and conflicting legislative fault allocation scheme.” *Werner v. KPMG LLP*, 415 F. Supp. 2d 688, 703 (S.D. Tex. 2006), which seems to conflict with the statutory fraud holding in *Davis v. Estridge*, 85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied). The issue is far from settled, and each particular case should be analyzed with care: if it “feels” like a tort, even if it arises under a statute, consider whether Chapter 33 might apply. As discussed *infra*, recent precedent from the Texas Supreme Court (specifically *JCW* and *Garza*) suggest that the answer may lie in the nature of the damages sought by the plaintiff – and whether they are purely economic damages related to a contractual relationship, or they arise from personal injury or property damage unrelated to a contractual arrangement.

UCC Article 3 Conversion: Chapter 33 does not apply.

In *Southwest Bank*, the Texas Supreme Court held that Chapter 33 did not apply to a Uniform Commercial Code § 3.420 claim for conversion. *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104 (Tex. 2004). The court of appeals had applied the rule of construction that a more specific statutory scheme

prevails over the more general Chapter 33 statute. *Id.* The Supreme Court found that applying Chapter 33's proportionate responsibility framework to claims involving Article 3 of the UCC, would "disrupt the UCC's carefully allocated liability scheme. . . . A more reasonable construction is that the Texas legislature and the UCC drafters considered and rejected comparative fault. . .". *Id.* at 108. The Supreme Court concluded: "We should not disturb that decision by applying Chapter 33 to those UCC-based conversion claims for which the drafters and legislature chose not to apportion responsibility. *Id.* at 109. The supreme court found that "conversion" under the UCC, while sounding in tort, was not a "tort claim," triggering Chapter 33's application. *Id.*

UCC Article 2 Implied Warranty: Chapter 33 may apply.

The Supreme Court in *JCW Elecs., Inc. v. Garza*, 2008 Tex. LEXIS 619, 51 Tex. Sup. Ct. J. 1104 (Tex. Jun 27, 2008), reversed the court of appeals and held that in a UCC Article 2 implied warranty case, where the claim is for "death or personal injury" under breach of implied warranty, one is seeking "damages in tort," and the Chapter 33 apportionment scheme applies.¹

JCW and the City of Port Isabel executed a contract under which JCW was to provide telephone service for the Port Isabel City Jail. *Id.* at *2. JCW installed a coinless telephone inside each jail cell so inmates could make collect calls. *Id.* On the night of November 14, 1999, nineteen-year-old Rolando Domingo Montez ("Montez") was arrested on a misdemeanor charge of public

intoxication and placed in Cell No. 1 of the Port Isabel City Jail. *Id.* The following day Montez made three telephone calls to Garza from inside his jail cell, requesting that she post bail. *JCW Elecs.*, 176 S.W.3d 618, 623 (Tex. App.—Corpus Christi 2005), *rev'd*, Tex. Sup. Ct. J. 1104 (Tex. Jun 27, 2008). Montez and Garza were subsequently informed that Montez would be released on his own recognizance at 5:00 p.m. on November 16, 1999. *Id.* at 623-24. At 4:45 p.m. on the day of his intended release, Garza arrived at the city jail to pick up Montez. *Id.* At 5:30 p.m., while Garza was waiting in the lobby, Montez was found dead, hanging from the cord of the telephone that JCW had installed in Cell No. 1. *Id.*

Garza sued the City of Port Isabel for her son's death and subsequently joined JCW as a defendant. *JCW*, 2008 Tex. LEXIS 619 at *2. The case was tried to a jury, which generally found in Garza's favor on claims of negligence, misrepresentation and breach of implied warranty of fitness. *Id.* The jury attributed sixty percent of the liability to Montez, twenty-five percent to the City of Port Isabel, and fifteen percent to JCW. *Id.* JCW moved for judgment, arguing that the sixty percent finding of fault the jury attributed to Montez barred Garza's recovery on all pleaded claims under Chapter 33. *Id.* Garza, however, moved to disregard certain inconsistent jury findings and for judgment notwithstanding the verdict, asking the court to render judgment against JCW for breach of contract and fraud. *Id.* at *2-3. The trial court granted Garza's motions, rendering judgment for her on these theories over JCW's objections. *Id.* at *3.

The court of appeals concluded that Garza's judgment could be affirmed on the jury's finding of breach of implied warranty of fitness for a particular purpose because there was evidence that JCW had represented to

¹ Chapter 33 nowhere focuses on the damages sought – "damages in tort" is a phrase used by the Court in *JCW* but is not based on statutory language. The Chapter 33 language is "any *cause of action* based on tort...for which relief is sought" TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1) (emphasis added).

the Port Isabel Chief of Police that the telephones would be safe for “unattended or unsupervised use by inmates.” *Id.* In affirming the trial court’s judgment, the court rejected JCW’s contention that Chapter 33 barred Garza’s implied warranty claim. *Id.* The court of appeals held instead that Chapter 33 did not apply to a claim for breach of implied warranty, noting that “any extension of chapter 33’s proportionate responsibility scheme to UCC Article 2 could potentially disrupt and override ‘the UCC’s express purpose of furthering uniformity among the states.’” *Id.* (quoting *Sw. Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104, 110-11 (Tex. 2004)).

The Texas Supreme Court granted review to consider whether Chapter 33’s proportionate responsibility scheme extends to a breach of implied warranty claim. *Id.* at *2.

Garza argued that the Texas Legislature intended to exclude breach of implied warranty claims from Chapter 33 when it replaced the comparative responsibility scheme adopted in 1987 with the proportionate responsibility scheme enacted in 1995. *Id.* at *5. The 1987 version expressly provided for the apportionment of responsibility of UCC Article 2 breach of warranty claims, but the 1995 amendments did not mention specific theories, instead providing that the chapter applies “to any cause of action based on tort.” *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1)). The Texas Supreme Court found that “the 1995 amendments expanded the chapter’s scope,” as it included previously excluded intentional torts. *Id.* at *7.

The Court also noted that “we have often recognized that ‘implied warranties are created by operation of law and are grounded more in tort than in contract.’” *Id.* at *8. The Court found that “an examination

of Chapter 33 as a whole confirms that the Legislature did not intend to exclude implied warranty claims from its apportionment scheme.” *Id.* at *9. The Court reasoned that “[t]he language ‘other conduct or activity that violates an applicable legal standard’ is different but clearly broad enough to include the breach of an implied warranty under UCC Article 2.” *Id.* at *10. Oddly, the Court did not address the situation where “property damage” under the 1987 version of Chapter 33 would have triggered Chapter 33’s proportionate responsibility scheme, even though property damage was eliminated from the language of the statute. The Court distinguished *Southwest Bank* by stating that, “[u]nlike UCC Article 3, Article 2 does not undertake a comprehensive fault scheme.” *Id.* at *13.

The JCW Damages Discussion

The Court, finding that Chapter 33 applied to implied warranty claims involving personal injury damages, further held that “[w]hen the claim involved death, as here, ‘claimant’ is defined to include not only the party seeking damages, but also the decedent.” *Id.* at *17. Since the jury found Montez negligent and apportioned sixty percent of the responsibility for his death, the Court held that Chapter 33 barred the plaintiff’s recovery, and reversed and rendered in favor of JCW. *Id.* Thus, under JCW, a breach of warranty claim alleging damages for personal injury or death sounds in tort, and Chapter 33 applies. As noted above, the distinction based on the particular damages sought is found nowhere in the language of Chapter 33. The practical effect of this decision is that personal injury plaintiffs are playing with a different, and less potent set of cards than plaintiffs whose alleged loss is purely economic.

In concurrence, Chief Justice Jefferson defended the *Southwest Bank* distinction by stating that “Chapter 33’s application here

would not, therefore, “ignore the UCC itself and thwart its underlying purpose.” *Id.* at *23 (quoting *Sw. Bank*, 149 S.W.3d at 111).” He added that JCW did not “involve a vicarious liability statute that removes from consideration the actual conduct of the alleged tortfeasor, making it difficult to harmonize with chapter 33.” *Id.* (citing *F.F.P. Operating Partners v. Duenez*, 237 S.W.3d 680, 695 (Tex. 2007)).

UCC Article 2 Express Warranty.

Given the Texas Supreme Court’s holding in *JCW*, one might expect Texas law to hold that all UCC warranty claims are grounded in tort, rather than contract. However, the Texas Supreme Court recently concluded that UCC express warranties “are contractual in nature.” *Med. City Dallas, Ltd. v. Carlisle Corp.*, 251 S.W.3d 55, 60 (Tex. 2008).

In *Carlisle*, the Texas Supreme Court was asked to determine whether an action for breach of express warranty permits recovery of attorney’s fees under TEX. CIV. PRAC. & REM. CODE § 38.001. A hospital experienced a leak in its roof, and it sued a roofing company that had repaired it for breach of express warranty as well as its attorney’s fees. *Id.* at 57. A jury returned a verdict in favor of the hospital on the breach of express warranty claim, and awarded attorney’s fees. *Id.* The court of appeals rendered a take-nothing judgment on the attorney’s fees, and the plaintiff appealed this issue. *Id.* The Texas Supreme Court began its discussion of the issue by noting that the section of the UCC that related to breach of express warranty claims is silent on attorney’s fees. *Id.* at 59. However, the court noted the similarities between a breach of contract claim and a breach of the damages, and held that a claim for breach of express warranty permitted an award of attorney’s fees:

The damages recoverable here support our conclusion that the claim is based in contract. Under the economic loss rule, the nature of the injury helps determine which duty or duties are breached and, ultimately, which damages are appropriate: “When the injury is only the economic loss to the subject of a contract itself, the action sounds in contract.”

Id. at 61.

A similar issue is playing out in 7979 *Airport Garage, L.L.C. v. Dollar Rent A Car Systems, Inc.*, 245 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2007, pet. filed). The *Dollar* case involved a breach of the warranty of suitability that is implied in every commercial lease contract. *Davidow v. Inwood N. Prof'l Group*, 747 S.W.2d 373, 377 (Tex. 1988). The plaintiff asserted claims for both breach of the implied warranty of suitability in the lease, as well as breach of the lease’s express terms, and recovered attorneys’ fees related to both claims. The court of appeals reversed, holding that a claim for breach of the warranty of suitability is not a contract claim for the purposes of awarding statutory attorneys’ fees. *See* 7979 *Airport Garage*, 245 S.W.3d at 509 n.31.

The *Dollar* court did not consider the source of the plaintiff’s damages, which were limited to economic loss related to the subject of the lease (use of a commercial parking garage as a car rental and public parking facility). Instead the court appeared to summarily conclude that implied warranties always arise in tort, regardless of the source of the defendant’s duty or the nature of the plaintiff’s damages – a conclusion that would warrant the application of Chapter 33. The parties are currently briefing the merits of the *Dollar*

case to the Texas Supreme Court, which may consider the issue of whether the implied warranty of suitability arises in tort or contract as a general matter, or in that case specifically.²

Dram Shop.

The Texas Supreme Court recently reiterated that Chapter 33 applies in dram shop cases. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007). See extended discussion, p. 9-18. For present purposes, it is sufficient to note that *Duenez* appears to reject the application of Chapter 33 where a cause of action arises from statute, as does *JCW*.

Antitrust.

In *Coca-Cola Co. v. Harmar Bottling Co.*, the issue before the appellate court was whether Chapter 33 applied to statutory antitrust claims, as the trial court had refused to submit jury questions under this section in

connection with payments made by settling defendants. *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 310 (Tex. App.—Texarkana 2003, no writ). *Coca-Cola* argued that Chapter 33 was applicable for two reasons: (1) it argued antitrust laws were analogous to tort actions, and (2) since Chapter 33 applied to DTPA claims, it would also apply to the statutory antitrust claims. *Id.* The court rejected both arguments, finding that Congress had not provided for contribution in antitrust actions, and that while Chapter 33 specifically mentioned DTPA claims, it made no reference to antitrust claims. Accordingly, the court held that the comparative responsibility of settling defendants did not need to be used to adjust awards in antitrust actions. *Id.*

The Texas Supreme Court, in a 5-4 decision, reversed the judgment of the court of appeals, which had affirmed the trial court's award of damages. The Court dismissed a number of the plaintiffs' claims and rendered a take-nothing judgment on the plaintiffs' remaining claims. *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671 (Tex. 2006). Because the Court determined that the plaintiffs' claims should be dismissed on jurisdictional grounds, it did not reach the merits of the lower court's proportionate responsibility ruling. Therefore, whether Chapter 33 applies to antitrust claims is not entirely settled.

Civil Rights: 42 U.S.C. § 1983

At least one federal district court has held that § 33.004 does not apply to 42 U.S.C. § 1983 claims. *Mims v. Dallas County*, No. 3-04-CV-2754-M, 2006 WL 398177, at *6-7 (N.D. Tex. Feb. 17, 2006) (magistrate recommendation). Focusing on the purpose of the civil rights statute, the court explained its rationale as follows (internal citations omitted):

² The struggle to determine whether and when a warranty claim sounds in tort or contract is not new. In *The Common Law*, Oliver Wendell Holmes stated that "breach of promise" claims were of "bastard origin." O. Holmes, *The Common Law*, Lecture VII at p. 18, available at http://biotech.law.lsu.edu/Books/Holmes/claw_c.htm. Holmes discusses the evolution of such claims, and that, "at the beginning of the reign of Henry VI, it was probably still the law that the action would not lie for a simple failure to keep a promise." *Id.* at 14. Instead, old English common law required that the harm be caused by the defendant's *negligence*. The irony of Holmes' discussion of the evolution of warranty claims is that, in light of *JCW*, Texas has taken steps to return to the strict "form pleading" developed under old English common law. Given *JCW*'s holding, courts are required to look to the damages alleged, rather than the substance of the claims; has Texas law "devolved" to the old English common law in which barristers were required to precisely plead their cases under the archaic claims of assumpsit, trespass, replevin, disseisor, assize, etc. and the failure to use the correct "magic words" could cause disastrous consequences for one's case?

[A]pplication of the Texas proportionate responsibility scheme would frustrate the two primary goals of 42 U.S.C. § 1983—compensation and deterrence. Some federal courts have refused to apply state laws permitting contribution among joint tortfeasors because it would weaken the “deterrent value” of section 1983. An even more compelling reason exists for not applying the Texas proportionate responsibility scheme, a product of the legislature’s sweeping tort reform initiative in 1995 and 2003, as it could directly affect, and most likely reduce, the ability of plaintiffs to recover full compensation for their injuries. Such a result would be wholly inconsistent with the purposes of the federal civil rights laws.

Id. at *6.

II. Chapter 33 in Fraud Cases.

If Chapter 33 applies to all tort claims, including “fraud” and “fraudulent inducement,” is Plaintiff’s contributory negligence now submitted to reduce damages from fraud? Why have courts distinguished common law and statutory fraud? Can a joint tortfeasor’s negligence be apportioned against intentional fraud?

It is now generally accepted that Chapter 33 requires the apportionment of responsibility among tortfeasors in a fraud case (along with all other intentional torts). *JHC Ventures, L.P. v. Fast Trucking*, 94 S.W.3d 762, 773 (Tex. App.—San Antonio 2002, no pet.) (“As fraud is clearly a claim based on tort, the Texas Proportionate Responsibility Statute applies to [the] fraud claim.”). But

in practice, Chapter 33 raises some knotty issues in fraud cases.

Apples and Oranges: Can The Jury Apportion Negligent Conduct And Intentional Conduct?

In apportioning responsibility between defendants, the statute is not clear about whether all culpable defendants must have the same state of mind in order to be jointly submitted (*i.e.*, what happens when Defendant No. 1’s negligence contributed to the damages caused by Defendant No. 2’s intentional fraud?) Even more challenging is the question of how to apportion responsibility between a defendant and the *plaintiff*: is a plaintiff’s negligence now a bar to recovery in a fraud case? Maybe.

The well-settled rule is that a person committing fraud cannot defeat a claim for damages based upon the argument that the party defrauded might have discovered the truth by the exercise of proper care. *See Koral Industries v. Security-Connecticut Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990) (citing *Labbe v. Corbett*, 69 Tex. 503, 6 S.W. 808, 811 (1888)). Therefore, in fraudulent inducement cases, failure to use due diligence to suspect or discover someone’s fraud will not act to bar the defense of fraud to the contract. *Plains Cotton Cooperative Ass’n. v. Wolf*, 553 S.W.2d 800, 804 (Tex. App.—Amarillo 1977, writ ref’d n.r.e.); *City of Houston v. Howe & Wise*, 373 S.W.2d 781, 790-91 (Tex. Civ. App.—Houston [1st Dist.] 1963, writ ref’d n.r.e.). But arguably, the plaintiff’s lack of diligence might be a causal factor in its own injuries resulting from the defendants’ fraud—and thus susceptible to apportionment against the defendants’ fraud.

This discussion also raises the question of whether a plaintiff who was more than negligent in causing his own damages can

ever recover fraud damage: if something more than negligence is required to compare the plaintiff's fault to an intentional tortfeasor's share of the responsibility, how would that be reconciled "justifiable reliance" element necessary for the plaintiff to recover? See *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) (justifiable reliance is an essential element in a common-law fraud claim).

Statutory Fraud

In the statutory fraud context,³ at least one court has rejected the application of Chapter 33 on this basis. *Davis v. Estridge*, 85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied) (holding that Chapter 33 does not apply to statutory fraud). This decision was based on the common law rule that a plaintiff's own negligence is never a defense to fraud. *Id.* at 311-12 ("Traditionally, negligence has never been a defense to fraud."). But the court's holding is also grounded on the fact that that it was a statutory fraud case—not common law fraud. *Id.* at 312 ("[T]he proportionate responsibility statute does not specifically include the Fraud in Real Estate and Stock Transactions statute within its application, as it does the DTPA."). The reader should keep in mind, however, that the Texas Supreme Court has not addressed this question in the common law or statutory context, so it remains unsettled.

Common Law Fraud

The only recent case to address common law fraud in a Chapter 33 cases did not squarely address the apples-to-oranges problem of comparing negligence to intentional conduct. In *JCW Electronics, Inc. v.*

Garza—one of the more significant recent cases regarding Chapter 33—the court held that the plaintiff's responsibility barred recovery on a fraud claim. 176 S.W.3d 618, 626 (Tex. App.—Corpus Christi 2005, *rev'd on other grounds*). The representative of a jail inmate's estate and others filed suit against an electronics company that installed telephones in jail cells after the inmate committed suicide. The inmate died after he used a cord from a telephone in his cell to hang himself. The plaintiffs alleged negligence, breach of implied warranty of fitness for a particular purpose, misrepresentation, breach of contract and fraud. The jury found for the plaintiffs on the issues of negligence, misrepresentation, and breach of implied warranty of fitness for a particular purpose. *Id.* However, the jury found that sixty percent of responsibility for the inmate's death was attributable to the inmate, with the other 40% attributable to JCW.

After the verdict, the trial court granted a judgment notwithstanding the verdict against JCW for fraud and breach of contract. JCW asked the appellate court to find that the trial court erred in rendering a judgment against it for fraud. *Id.* at 626. JCW argued that the plaintiffs were barred under Chapter 33 from recovering any damages for fraud, as the jury had apportioned more than 50% of responsibility to the inmate. *Id.* The court agreed, stating:

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. Because fraud is a claim based on tort, Chapter 33 applied... Therefore... [plaintiffs] are barred from recovering damages based on their fraud claim."

³ TEX. BUS. & COM. CODE § 27.01, the statutory fraud provision, governs fraud in transactions involving real estate or stock in a corporation or joint stock company.

Id.

Because this case involved intentional conduct by the injury party—suicide—this case did not address the conundrum of whether and to what extent a plaintiff’s negligence (or other less-than-intentional conduct) will bar recovery in a fraud case.

The Texas Supreme Court in *JCW* did not discuss the appellate court’s decision on the fraud issue. However, it is interesting to contemplate what effect, if any, the Supreme Court’s statement that “the 1995 amendments *expanded* the chapter’s scope” will have on the applicability of Chapter 33 to the fraud issues discussed herein.

Participation and Benefits of Fraud

Can a fraud defendant who allegedly made the offending misstatement designate RTPs who participated in or benefited from the fraud—but did not make any misrepresentations? The Houston Court of Appeals answered in the affirmative. *In re Arthur Andersen LLP*, 121 S.W.3d 471 (Tex App.—Houston [14th Dist.] 2003, mandamus denied). In *Arthur Andersen*, the plaintiffs made “broad, sweeping allegations” of fraud against certain defendants for conduct related to the Enron scandal. These allegations included the claim that financial institutions helped the defendants with transactions designed to conceal Enron’s debt and to artificially inflate earnings. Because the financial institutions allegedly participated in or benefited from the fraud, they could have been liable to the plaintiffs even though they did not make any misrepresentations. *Id.* at 481. Therefore, in fraud cases, a defendant need not make a *direct* fraud case against an RTP in order to join or designate—rather, an allegation that the RTP knowingly participated or benefited in the fraud may be sufficient.

A bankruptcy court recently was asked to determine the applicability of Chapter 33 in a case in which the trustee alleged that several lenders aided and abetted and conspired to defraud customers that purchased products from the debtor. *In re Today’s Destiny, Inc.*, 388 B.R. 737 (Bankr. S.D. Tex. 2008). The Court found that “if these allegations are proven true and 100% of the liability [to the customers] is imposed on [the debtor], [the debtor] would be entitled to contribution from [the lenders] for their proportionate share.” *Id.*

III. Does Vicarious Liability Equal More Blanks in the Charge?

After *Duenez*, may a party request the submission of individual officers and employees of a plaintiff or a defendant as RTP’s when supported by proper motion and evidence?

The precise legal issue confronted in *Duenez I and II* was whether the trial court should have submitted to the jury both the intoxicated driver’s percentage of responsibility under Chapter 33 and that of the dram-shop, and, if so, the effect of the failure to include that submission. The supreme court’s opinion in *Duenez I* held the trial court should have included the submission of proportionate responsibility, but the failure to do so was not reversible error because the intoxicated driver’s percentage of responsibility would have been attributed to the dram-shop under the language of Texas Alcoholic Beverage Code Chapter 2 (the “Dram Shop Act”) (in the fashion of vicarious liability).

Facts of *Duenez*.

Five members of the Duenez family were injured when their car was struck head-on by an intoxicated driver, Roberto Ruiz. *Duenez I*, 2004 WL 1966008, at *1. Shortly

before the collision, Ruiz had purchased alcohol from a Mr. Cut Rate convenience store owned by F.F.P. Operating Partners, L.P. (“F.F.P.” or “dram shop”):

After consuming a case-and-a-half of beer, Roberto Ruiz drove his truck to Mr. Cut Rate convenience store owned by F.F.P. Operating Partners, L.P., and purchased a twelve-pack of beer. The store’s assistant manager, Carol Solis, sold the beer to Ruiz. Ruiz then got into his truck, opened a can of beer, and put the beer can between his legs. Ruiz then drove into a nearby highway, and several times swerved into oncoming traffic. Two cars had to dodge his truck to avoid a collision. As he crossed a bridge less than a mile from the convenience store, Ruiz swerved across the center line and hit the Duenezes’ car head-on. *Id.*

Nine-year-old Ashley, who suffered a traumatic brain injury and whose semi-vegetative state requires round-the-clock care for the rest of her life, was among the injured Duenez family members. *Id.*

The Duenez family had initially sued F.F.P., Ruiz, F.F.P.’s assistant manager, the beer company, and the landowner where Ruiz had spent the afternoon working and drinking. *Duenez I*, 2004 WL 1966008, at *1. F.F.P. filed a cross-action against Ruiz, naming him a responsible third party. *Id.* The Duenez family eventually non-suited all defendants except F.F.P. *Id.* Despite F.F.P.’s cross-action, the trial court refused to submit Ruiz’s percentage of responsibility to the jury as the supreme court had previously required; the trial court severed the cross-action. *Id.*; see also *Smith v. Sewell*, 858 S.W.2d 350, 356 (Tex. 1993)

(involving the intoxicated patron’s efforts to recover from the dram shop after a serious collision). F.F.P. timely objected to the omission of a jury question submitting Ruiz’ percentage of responsibility, but the trial court overruled F.F.P.’s objections. *Duenez I*, 2004 WL 1966008, at *2.

Ruiz pled guilty to intoxication assault and was sentenced to prison. *Id.* at *1. The jury questions tracked the Dram Shop Act precisely, and the jury found that (1) when F.F.P. sold alcohol to Ruiz it “was apparent to the seller that he was obviously intoxicated to the extent that he presented a clear danger to himself and others,” and (2) Ruiz’s intoxication was a proximate cause of the collision. *Id.* at *2. The trial court entered judgment against F.F.P. for the full amount of the jury’s \$35 million verdict. *Id.* The damages finding was not challenged on appeal. *Id.*

Additional Facts Not in the Texas Supreme Court’s Opinions.

A breathalyzer test, given to Ruiz over two hours after the accident, revealed a blood-alcohol concentration of .157. Respondents’ Brief on the Merits at 2, *F.F.P. Operating Partners, L.P. v. Duenez*, 2004 WL 1966008 (Tex. Sept. 3, 2004) (No. 02-0381). It was undisputed the Duenez family bore no responsibility for the wreck. When Ruiz entered the Mr. Cut Rate store owned by F.F.P., Ruiz reeked of beer, was drooling and swaying, could not walk straight, and was obviously intoxicated. Respondents’ Brief at 2, *Duenez I* (No. 02-0381). A volunteer firefighter present when the assistant manager sold Ruiz the twelve-pack remarked to her at the time: “I wouldn’t have sold that man that beer.” *Id.* at *1. Just a few weeks before the wreck, the Texas Alcoholic Beverage Commission cited the assistant manager for selling alcohol to minors; F.F.P.’s store manager

had also been recently cited for a different incident a few weeks prior to the accident. *Id.* at *3. F.F.P.'s manager at the time of the accident testified that in her 1 ½ years as store manager, *not a single person* ever walked into the store obviously drunk. *Id.* In their Brief, the Duenez family noted that statewide alcohol accounted for 7.1% of the net revenues for Mr. Cut Rate stores; at this particular store, alcohol sales accounted for 50% of net revenues. *Id.*

Procedural History—Court of Appeals Opinion.

The court of appeals affirmed the trial court's judgment. The appellate court distinguished *Sewell* as a first-party claim, one where the obviously intoxicated patron was attempting to recover for damages. *See Sewell*, 858 S.W.2d at 356. Relying on the language of the Dram Shop Act, the court of appeals held that in third-party actions where there is no allegation of negligence on the part of the plaintiff(s), the provider/dram shop is vicariously liable for the damages caused by an intoxicated person and is not allowed to offset the dram shop's liability by some percentage of fault attributable to the intoxicated patron. *Duenez I*, 2004 WL 1966008, at *2. Viewing the Dram Shop Act as establishing a scheme of vicarious liability, the appellate court analogized the present case to that of an employer liable for damages caused by an employee in the course and scope of employment. *Id.* at *4. The court of appeals also held that Ruiz could not be a "responsible third party" or one liable for contribution (setting aside indemnity), because, again, the Dram Shop Act established vicarious liability, not direct liability. *Id.* Presumably, the dram shop would be entitled to indemnity from the intoxicated person. Of course, the likelihood that the intoxicated person would not have the financial means to satisfy the

indemnity claim is the impetus for the Duenez controversy.

Supreme Court's Majority Opinion—*Duenez I*.

Duenez I was decided by a five-to-four majority with Justice O'Neill writing for the majority. The majority noted the Legislature's purpose in enacting the Dram Shop Act: "[D]eter providers of alcoholic beverages from serving alcoholic beverages to obviously intoxicated individuals who may potentially inflict serious injury on themselves and on innocent members of the general public." *Duenez I*, 2004 WL 1966008, *2 (citing *Sewell*, 858 S.W.2d at 356). Yet, Chapter 33 applies to "any cause of action based on 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).

The majority observed that Section 33.003 requires the trier of fact to apportion responsibility "with respect to each person's *causing or contributing to cause* in any way the harm for which recovery of damages is sought," but certain types of claims are excluded from apportionment—such as worker's compensation cases. *Duenez I*, 2004 WL 1966008, at *3 (emphasis added). Respondent's Brief on the Merits discussed this language extensively, along with the peculiar functioning of the Dram Shop Act, which does not require any finding of dram shop causation. Respondents' Brief at 12-22, *Duenez I* (No. 02-0381). The Duenez family argued that because the Dram Shop Act imposes strict liability for sale to an obviously intoxicated person, whether or not that additional sold alcohol contributes in the least and at all to *cause* the event in question, the requirement of Section 33.003 of "causing or contributing to cause" was never triggered—there is nothing to

apportion (and of course the jury had already found the *patron's* intoxication was a cause of the accident). *Id.* at *13. Just four years earlier, the Texas Supreme Court held it was reversible error to submit the dram shop's causation, or to allow the jury to consider same. *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 413 (Tex. 2000) (error to submit jury question asking if it found the conduct of the restaurant to be proximate cause of the occurrence in question, and reversing).

To quote Respondent's Merits Brief:

Under the Dram Shop Act, the liability of the dram shop turns on proof only of two elements: (1) that at the time the sale occurred, it was apparent that the individual being sold the alcohol was "obviously intoxicated to the extent he presented a clear danger to himself and others;" and (2) that "the intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered."

Respondents' Brief at 13, *Duenez I* (No. 02-0381) (citing TEX. ALCO. BEV. CODE § 2.02(b)).

* * *

In other words, liability does not turn on a finding that the dram shop's sale of the alcohol caused the damages, but rather on a finding that the customer's intoxication caused the damages. Since liability is based solely on the intoxicated customer's causation, there is nothing to compare for purposes of the proportionate responsibility statute.

Id. The *Duenez I* majority side-stepped this issue and instead held that *Sewell* still governed, even though *Sewell* never addressed Chapter 33's express requirement there be some *causation* attributable to each party whose proportionate responsibility is being submitted. This is probably because the dram shop was essentially conceding its causation in *Sewell*, and the supreme court, after reluctantly conceding that the express language of the Dram Shop Act allowed a cause of action by the drunk patron against the dram shop, assumed a percentage allocation would likely bar the drunk patron's ability to recover because of the 51% bar rule in Chapter 33.

Even though the *Duenez I* majority quoted *Borneman*⁴ and conceded that the Dram Shop Act has a "derivative component," the majority rejected the notion the Dram Shop Act creates "pure" vicarious liability. *Duenez I*, 2004 WL 1966008, at *4 (noting that the Act has a direct liability component that the court of appeals wholly ignored). Because the dram shop's liability arose in part from its own misconduct (i.e., the provider made alcohol available to an obviously intoxicated patron), the majority found what it called "partially imputed causation" in the Dram Shop Act. *Id.* This invention—partially imputed causation—and the lightly scrutinized opinion in *Sewell* were sufficient in the majority's eyes to trigger Chapter 33's requirement that the jury allocate percentages of proportionate responsibility.

Did the failure to submit percentages of responsibility require reversal? "No," according to the majority, because under the plain language of the statute the dram shop

⁴ "The Act imposes liability on providers for the 'actions of their customers' regardless of whether the provider's conduct actually caused the injuries suffered." *Borneman*, 22 S.W.3d at 413.

would ultimately be liable for both its own share and the share of responsibility of the intoxicated patron, which sounds strikingly similar to vicarious liability. See TEX. ALCO. BEV. CODE § 2.03 (“liability of providers under this chapter for the actions of their employees, customers, members, or guests who are or become intoxicated...”). The *Duenez I* court further noted that the statutory scheme clearly contemplated imputed liability: “If the provider who serves a clearly intoxicated patron does not bear responsibility for injuries caused by the patron’s intoxication, the remedy the Legislature provided in the Dram Shop Act would be meaningless.” *Duenez I*, 2004 WL 1966008, at *5. The percentage of responsibility placed on the patron would be imputed to, and borne by, the dram shop, and innocent third parties would not bear the brunt of the fault-finding attributable to the drunk driver in *Duenez I*; the drunk driver was in prison and likely insolvent. This way, the majority viewed it was giving effect to both the Dram Shop Act and Chapter 33.

The *Duenez I* Dissent: A Plain Text Reading?

Justice Owen authored the dissent in *Duenez I*, which emphasized that since the Dram Shop Act is not in the enumerated exceptions to Chapter 33’s required proportionate responsibility submissions, and because of *Sewell*, the trial court had no choice but to submit *both* the dram shop’s and intoxicated person’s proportionate responsibility, *without* attributing the patron’s percentage finding to the dram shop. *Duenez I*, 2004 WL 1966008, at *11 (Owen, J., dissenting) (“Such a holding prevents an injured party from placing all the blame on the bar owner; instead, at least part of the responsibility will be place on the *truly culpable party* in the best position to prevent the injury, the drunk driver”)

(emphasis added). According to the dissent, the percentage of fault assessed against the insolvent drunk patron ultimately is borne by the innocent family, not the over-serving dram shop.

While the majority acknowledged Chapter 33’s requirement that only parties “*causing* or contributing to cause” the occurrence be submitted on a percentage basis, and therefore resorted to applying “imputed” causation to deal with the express language, the dissent focused on the Dram Shop Act’s absence from the list of exceptions to submission contained in Chapter 33, without ever addressing Chapter 33’s criteria for being triggered in the first place. *Id.* (“The Legislature has said who is *not* entitled to proportionate responsibility, so that the risk of insolvency when there is more than one tortfeasor does not fall on an innocent third party. But alcohol providers are not among those enumerated.”). The dissent failed to consider the possibility that the Legislature saw no need to include in a list of exceptions a Dram Shop Act which had no “causation” component as far as the dram shop is concerned, so that Chapter 33 is never triggered in the first place, as the Supreme Court had previously acknowledged in *Borneman v. Steak & Ale of Tex., Inc.*, 22 S.W.3d 411, 412 (Tex. 2000). The Texas Legislature may have thought the problem taken care of by Chapter 33’s precise requirement of submitting percentages only of those “*causing* or contributing to *cause*...” (emphasis added). Or, the Legislature might have assumed that a statute expressly creating vicarious liability was itself an exception to Chapter 33.

The dissent sidesteps the plain text of the Dram Shop Act, and the legislative scheme created thereby:

It bears repeating that the only statutory language the Court can

find that supports its conclusion that the proportionate liability provisions of the Proportionate Responsibility Act do not apply is a phrase in a sentence in Section 2.03 of the Alcoholic Beverages Code that says, “The liability of providers under this chapter for the actions of their employees, customers, members or guests who are or become intoxicated is in lieu of common law or other statutory law warranties and duties of providers of alcoholic beverages.” *I simply cannot discern all the consequences the Court ascribes to this phrase. Duenez I, 2004 WL 1966008, at *13 (emphasis added).*

Of course, by strictly applying Chapter 33 to dram shop cases, the dissent’s approach arguably reads out of the Dram Shop Act the key phrase: “liability of providers..for the actions of their...customers.”⁵

The dissent also dwells on a rather interesting hypothetical not posed by the facts of *Duenez*, and, in fact, confounded by it. The dissent considered a hypothetical where a patron gets drunk at home and then proceeds to three bars, in succession being served but not consuming a beer, and then consuming one beer in each of the last two

⁵ See Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-40 (1947) (hereinafter “Frankfurter, *Reflections*”) quoted in *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994); see also, Antonin Scalia, *A Matter of Interpretation, Federal Courts and the Law* (1997). Cf Justice Frankfurter’s salutary quote of Justice Holmes: “[Previously] I was indiscreet enough to say I don’t care what [the legislature’s] intention was. I only want to know what the words mean.” Frankfurter, *Reflections*, p. 538. It would be difficult to imagine a clearer express statement of legislative intent to create “pure” vicarious liability than the one in the Dram Shop Act.

establishments. *Duenez I, 2004 WL 1966008, at *13.* A jury finds the patron 75% responsible, the first bar 5% responsible, and the second and third bars 10% responsible each. *Id.* The dissent laments the majority’s holding resulting in 80% liability on the bar found only 5% responsible: “But liability for 80 percent of the damages when a jury found 5 percent responsibility is not the Legislature’s proportionate responsibility scheme.” *Id.* Which begs the question: is it the Legislature’s intent under the Dram Shop Act?

Post-*Duenez I* Developments.

In one of the more interesting post-*Duenez I* cases, the plaintiff sued the “Memphis” bar and a drunk patron, Willey, alleging that he was injured when he attempted to break up a fight with Willey. *Memphis, Inc. v. Coggsell*, No. 05-02-01876-CV, 2005 WL 1774973 (Tex. App.—Dallas 2005, pet. denied). Though the trial court submitted negligence issues as to the plaintiff, Willey and the bar, the percentage responsibility question only inquired as to Coggsell and the bar. *Id.* The jury allocated 100% to the bar. *Id.* The bar argued it was error not to include the allegedly drunken patron in the percentage responsibility question submitted to the jury, according to the express language of TEX. CIV. PRAC. REM. CODE ANN. § 33.003(a), and the Supreme Court’s opinions in *Smith v. Sewell*, 858 S.W.2d 350, 356 (Tex. 1993) and *Duenez I. Id.* at *2.

In a memorandum opinion, the Dallas Court of Appeals held it was error to omit Willey from the percentage responsibility question. *Id.* at *3. However, unlike the holding in *Duenez*, the court held the error was not harmless:

However, the [*Duenez I*] court held the omission in that case was harmless because nothing prevented a jury from fairly apportioning responsibility between F.F.P. and the drunk driver in a separate, severed action against the drunk driver. In this case, all the parties were before the court in a single action, and the negligence of all the parties was submitted to the jury. Under these circumstances, it was reversible error to fail to include all the parties in the proportionate responsibility question.

Id. (internal citations omitted).

In another post-*Duenez I* case, Plaintiff Sureties provided bonds to two Pate companies. *Fidelity & Guaranty Insurance Underwriters Inc. v. Wells Fargo Bank, N.A.*, No. Civ.A. H-04-2833, 2006 WL 870683 (S.D. Tex. March 31, 2006). Wells Fargo provided products and services to the Pate entities. *Id.* When the Pate entities became insolvent, the Sureties sued Wells Fargo, alleging it facilitated breaches of common law and statutory fiduciary duties. *Id.* at *2. Sureties filed interrogatory answers admitting that the Pate entities were “100% responsible” for the Sureties’ alleged damages. *Id.* at *3. Wells Fargo moved for summary judgment that as a matter of law it could not be liable under the proportionate liability statute in Chapter 33. *Id.* The Sureties countered that Wells Fargo, as an aider and abettor, was derivatively and vicariously responsible for the Pate entities’ conduct. *Id.* at *4. Relying on *Duenez I* and *Bedford*, the court concluded that “joint and several liability” would apply, but that Chapter 33 would not. *Id.* at *4-6. “In light of the fact that the Proportionate Responsibility Statute has already been declared inappropriate in certain contexts,

see, e.g., Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656-57 (Tex. App.—Dallas 2002, pet denied), as well as the fact that the claims at issue in this case involve allegations of highly culpable conduct, this Court concludes that joint and several liability is appropriate in this case as to the claims at issue.” *Id.* at *5.

Three In the Majority Depart and Rehearing Is Granted.

After the Texas Supreme Court decided *Duenez I* in September 2004, there was significant turnover on the court, with the departure of three of the Justices who joined with Justice O’Neill in the majority. Justice Michael Schneider was appointed to the federal bench, Justice Tom Phillips had already announced his retirement, and Justice Smith was defeated for re-election by now-Justice Paul Green. Justice Phil Johnson was appointed to fill the vacancy created by Justice Schneider’s departure (Justice Johnson was not sworn in at the time of the rehearing vote), and another member of the majority, Justice Wallace Jefferson, was appointed to fill Justice Tom Phillips’ position as Chief Justice. Justice David Medina was appointed to fill this vacancy. On April 8, 2005, just before the deadline set by the Texas Constitution, the supreme court granted rehearing in *Duenez*. Only eight justices participated in the vote on rehearing. The only remaining Justices from the original majority were Justices O’Neill and Jefferson. And of course, the author of the dissent, Justice Owen, is now on the Fifth Circuit Court of Appeals, after a historically contentious confirmation. The rehearing in *Duenez* occurred on September 27, 2005.

Duenez II: The Supreme Court Reverses Course

In *Duenez II*, the Supreme Court, in a 7-2 opinion, reversed its prior ruling and held that Chapter 33 mandates that a dram shop provider may not be vicariously liable for the acts of an intoxicated patron. *F.F.P. Operating Ptnrs., L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007). Since the trial court did not submit percentages of responsibility to the jury, the Court remanded the case for a new trial. The Court's holding was based upon its interpretation of the proportionate responsibility scheme set out in Chapter 33. *Id.* at 688-689. The Court also reasoned that its decision was based on *Sewell*, as, according to the Court, the premise of *Sewell* is that "the provider's liability stems from its own conduct." *Id.* The Court addressed and rejected policy arguments accepted by the lower court and raised in both dissents that an unintended consequence of its holding would be that innocent victims would be forced to bear the burden of insolvent patrons, stating, "by enacting Chapter 33, the Legislature made the policy decision that an innocent third party, suing the intoxicated patron and the dram shop, could be burdened with the risk of a joint tortfeasor's insolvency." *Id.* The Court reasoned that dram shop actions could not be subject to joint and several liability because:

the Chapter 33 proportionate responsibility scheme includes exceptions for certain torts, but claims against providers of alcohol are not among those exceptions. For example, the Legislature carved out exceptions for a host of criminal acts, declaring that there should be joint and several liability instead of proportionate responsibility, but only if there was

specific intent to do harm to others and the defendant acted in concert with another...Section 33.002 expressly excluded from its coverage actions to collect workers' compensation benefits, actions against an employer for exemplary damages arising out of the death of an employee, and claims for exemplary damages included in an action to which this chapter otherwise applies. When the Legislature has chosen to impose joint and several liability rather than proportionate responsibility, it has clearly said so." *Id.* at 690.

Chief Justice Wallace Jefferson and Justice O'Neil filed separate, sharply-worded dissents. Chief Justice Jefferson argued that the majority's holding contradicts the very essence of the Dram Shop Act, since the Legislature intended for alcohol providers to pay for the harm caused by an obviously intoxicated patron. *Id.* at 694. The dissent asserted that, under the majority's ruling, "the bar may avoid liability precisely because its patron was so 'obviously intoxicated' and such a 'clear danger' that the sale could not have proximately caused carnage on a Texas road. The dram shop thus has a perverse incentive to establish at trial that its customer was in such a drunken state that selling him 'one for the road' could not have contributed to the harm his intoxication later caused. I cannot agree that the Legislature intended as a defense to liability proof that the dram shop completed a sale that the statute quite sensibly forbids." *Id.* at *41-42. Chief Justice Jefferson argued that under the Dram Shop Act, the only causation that is required for a provider to be liable under the statute is for the provider to sell alcohol to an obviously intoxicated patron. *Id.* After the plaintiff establishes this, according to Jefferson, the causation

focus shifts entirely to the acts of the drunken patron. *Id.* According to Jefferson, while this interpretation of the Dram Shop Act is a harsh, even punitive one, the Legislature provided an adequate safe harbor for dram shops in the form of the trained server defense.⁶ *Id.* at 696, n 3.

Justice O’Neil focused on the strange set of circumstances surrounding the Court’s decision to grant the motion for rehearing, stating, “between the time the Court issued its original decision in this case and the date rehearing was granted, more than seven months passed and three members of the former majority left the Court. The motion for rehearing raises no new issues; every point was thoroughly considered by the court in its prior decision. While the motion for rehearing was pending, the legislature convened without taking any action to alter this court’s original interpretation. Nevertheless, the court today withdraws the prior opinion, reaches the opposite result, and accomplishes judicially what the legislature itself declined to do.” *Id.* at 703. Justice O’Neil endorsed the Court’s prior ruling in *Duenez I*, and stated that “[r]ather than reiterate the original opinion’s exhaustive analysis here, I attach the Court’s decision as an appendix to this dissent.” *Id.*

Additional Thoughts About *Duenez*.

The Dram Shop Act was first passed in 1987. Underwood and Morrison have extensively analyzed the legislative history of the pre- and post-1995 versions of

⁶ The “trained server defense” is an affirmative defense which states that a dram shop may avoid liability for its employee’s actions if the provider establishes that it required the employee to attend a training course approved by the Texas Alcoholic Beverage Commission, the employee actually attended the course, and the provider did not encourage the employee to violate the Alcoholic Beverage Code. TEX. ALCO. BEV. CODE, §106.14.

Chapter 33, as each version relates to vicarious liability:

Nothing in either the language or the legislative history of the 1995 amendments to the apportionment of responsibility provisions of Chapter 33 suggests, however, that the legislature intended to change the traditional rule that responsibility is not allocated among persons who are directly liable on the one hand and those who are either vicariously or derivatively liable on the other....Section 33.003 provides that the jury is to allocate responsibility only among those who engaged in “conduct or activity” that “causes or contributed to cause” the “harm for which recovery of damages is sought”...those courts to consider the issue have consistently held that juries should not be asked to apportion responsibility between a directly responsible party and a party whose liability is purely vicarious.

See William D. Underwood and Michael D. Morrison, Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another, 55 BAYLOR L. REV. 617 (2003).

The article concludes that the result of the Court of Appeals opinion in *Duenez* is correct.

There is also some helpful legislative history to the Dram Shop Act.⁷ The Dram Shop

⁷ A strict plain textualist would never resort to legislative history—see, e.g., Antonin Scalia, *A Matter of Interpretation*, Princeton University Press, 1997. But given the struggle by both the majority

Act's language "clear danger to himself and others" came from the Penal Code requirement for public intoxication.

The Legislature has included an express causation requirement in a statutory cause of action or liability statute when it wanted to do so. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 88.002(a) (2004) ("proximate cause" in managed care claims).

The legislative history of the 1995 revisions to Chapter 33 contain some broad statements from key proponents of the legislation supporting Justice Owen's dissent. Senator Bill Ratliff stated: "I think what we are trying to do there is make sure that nobody continues to read this law as being limited to cases of either negligence or products that cause personal injury, property damage or death....We're really trying to say no matter what the theory, no matter what type of case you're dealing with, you're still under this principle." 3 Scott A. Sherman, *Texas Tort Reform: The Legislative History—Joint and Several Liability*, at II-121 (1995) (hereinafter *Sherman*). Senator David Sibley stated: "A major component of [the 1995 revisions]...[is that] [r]ight now the plaintiff controls the list of the people who are submitted to the jury for apportionment of fault. We're changing that, and we're going to give the defendant something to say about that....[I]n the past what we've had is people joined in court who are deep pockets. And it may be somebody else just as much at fault, and we're going to allow the defendant to bring him in...." *Sherman* at II-16, II-29 to II-30.

and dissent to reconcile the language of Chapter 33 requiring percentage submission only of parties "causing or contributing to cause," with the language from the Dram Shop Act making the provider liable for the conduct of the customer, perhaps legislative history should be examined if for no other reason than to at least acknowledge the legislature's role in debates over legislative enactments.

But isn't it the *lack* of a deep pocket to reimburse/indemnify the dram shop which drives the *Duenez II* majority opinion?

In none of the Legislative debates over Chapter 33 is there any significant discussion of how Chapter 33 impacts liability imposed by the Dram Shop Act. *See also Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000) (holding that a nonsubscribing employer is not entitled to a jury question on employee's comparative responsibility—the Texas Labor Code precludes a finding of contributory negligence just as *Borneman* precludes finding of dram shop causation).

The Reach of *Duenez II*.

With respect to the vicarious and derivative liability question, the Texas Pattern Jury Charge 4.3 (2003) (Proportionate Responsibility) contains the following commentary: "In cases which there is no causation inquiry, such as those involving negligent entrustment or negligent hiring," the proportionate responsibility question should not be predicated on a proximate cause question, but on the question otherwise determining liability. *Id.* at cmt a. (see also TPJ Sec. 4.4 commentary). "In those cases, an instruction should be given in connection with the proportionate responsibility question informing the jury that causation is imputed based on the appropriate legal standard." *Id.* The commentary then provides this example:

As to Edna Entruster, "negligence" means entrusting the vehicle to a reckless driver if the entrustor knew or should have known that the driver was reckless. Such negligence is a proximate cause of a collision if the negligence of the driver to whom the vehicle was entrusted is a proximate cause of the collision.

Some Texas cases have compared “derivative liability” to vicarious liability, and have refused to apportion responsibility between a negligent supervisor, employee or entrustor and the second tortfeasor who actually causes the injury:

Negligent entrustment liability is derivative in nature. *See Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. Civ. App.—El Paso 1966, writ ref’d n.r.e.). While entrusting is a separate act of negligence, and in that sense not imputed, it is still derivative in that one may be extremely negligent in entrusting and yet have no liability until the driver causes an injury. If the owner is negligent, his liability for the acts of the driver is established, and the degree of negligence of the owner would be of no consequence. When the driver's wrong is established, then by negligent entrustment, liability for such wrong is passed on to the owner. *Id.* We believe the better rule is to apportion fault only among those directly involved in the accident, and to hold the entrustor liable for the percentage of fault apportioned to the driver.

See Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ); *see also Wyndam Hotel Co. v. Self*, 893 S.W.2d 630, 640 (Tex. App.—Corpus Christi 1994, writ denied) (“In a negligent entrustment claim where the driver is not a party to the suit, an ideal submission of the issue would not inquire into the comparative negligence of the driver’s conduct [because] the liability for [the] wrong attributed to the driver is passed

on to the owner as a matter of law.”) (internal quotations and citation omitted).⁸

Before *Duenez I* was decided, the Dallas Court of Appeals rejected the argument that a “derivative” negligence claim such as negligent supervision should be afforded independent submission for a determination of the employer’s percentage of fault. *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 656-57 (Tex. App.—Dallas 2002, pet. denied). Analogizing derivative negligence claims to vicarious liability, the court explained its holding as follows:

The [plaintiffs] contend that Central West should be included because it was a producing or contributing cause of the injuries to Chad. Although negligent entrustment and negligent hiring are considered independent acts of negligence, these causes are not actionable unless a third party commits a tort. *See Loom Craft Carpet Mills, Inc.*, 823 S.W.2d at 432. In that respect, these causes are similar to the respondeat superior theory of recovery where, unless the employee commits a tort in the scope of employment, the employer has no responsibility. In

⁸ A hint about the Court’s attitude towards negligent entrustment cases is found in *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007), the plaintiff sued after being injured in a collision with a vehicle driven by an employee on a personal errand. The plaintiff sued the employer for negligent entrustment and for vicarious liability under the doctrine of respondeat superior. *Id.* at *1. The Texas Supreme Court rendered judgment for the employer, finding that record contains no evidence that, at the time [the employer] entrusted the vehicle to [the employee], [the employee] was an unlicensed, incompetent, or reckless driver or that [the employer] knew or should have known [the employee] was an unlicensed, incompetent, or reckless driver. *Id.* at *8.

reviewing the application of section 33.003 to responsibility, we observe that, while the statute on its face requires all defendants to be included in the apportionment question, it would not be proper for an employer to be included along with the driver if its only responsibility was that of respondeat superior. Section 33.003 has not been used to require both a driver and employer to be submitted in the apportionment question in that situation. *Id.*

IV. Apportionment Problems

When preparing a jury charge for submission, and asserting objections to the other side's proposed jury charge, it is important to understand what is being apportioned. Does submitting "proportionate responsibility" mean allocating causation, damages, fault or harm? How many apportionment questions must be submitted? On what does it really depend? How should damages issues be tied to other parts of the charge, including the apportionment issue? How many damages questions should be submitted in light of *Romero* and *Casteel*?

Retreat from Broad Form

For over twenty years, the Texas Supreme Court has mandated broad form submission "whenever feasible." See TEX. R. CIV. P. 277. In *Lemos v. Montez*, Chief Justice Jack Pope noted that "[j]udicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges." *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984). Sixteen years ago, Justice Nathan Hecht discussed complex jury charge preservation rules:

The preparation of the jury charge, coming as it ordinarily does, at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. To complicate this process with complex, intricate, sometimes contradictory unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury, hardly serves the fair and just presentation of the case.

State Dep't of Hwy. & Pub. Transp. v. Payne, 838 S.W.2d 235, 240 (Tex. 1992).

To see how much the supreme court has departed from broad form submission in recent years, one need only consider two cases: *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) and *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). Until *Casteel*, Texas Rule of Civil Procedure 277's admonition the use broad form submission "whenever feasible" was, for the most part, carefully followed by the court. In *Casteel*, the Texas Supreme Court overruled three separate courts of appeal that held that submission of an invalid theory of liability in a single broad form question was harmless, if any evidence supported a finding of liability on a valid theory. *Casteel*, 22 S.W.3d at 388. In *Casteel*, the supreme court found that four of the thirteen theories contained in a single liability question were invalid theories of recovery. *Id.* at 389 (noting that it was impossible for the supreme court to conclude that the jury's answer was not based on one of the improperly submitted theories).⁹

⁹ Arguably this reverses the burden on appeal, from that of an appellant's burden to show that error was harmful, to place on the recovering party, the appellee, the burden to show that error was *not* harmful.

In *Harris County v. Smith*, the supreme court held that the trial court committed harmful error by submitting a broad form question on damages that included an element of damages that did not have evidentiary support. *Smith*, 96 S.W.3d at 23. According to then Chief Justice Phillips, it did not matter whether the trial court's error was in a submission of an invalid liability theory, as *Casteel*, or as in *Smith*, an unsupported element of damages. *Smith*, 96 S.W.3d at 235. According to the majority, the appellant was prevented from demonstrating the consequences of any error on appeal when broad form submission was used.¹⁰

The Texas Supreme Court extended this analysis in the *Romero* case, where it held that the failure of one of two claims on evidentiary grounds required reversal when tied to a single apportionment question, because the question allowed the jury to apportion responsibility based on both valid (negligence) and invalid (malicious credentialing) claims. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212 (Tex. 2005).

Romero v. KPH Consol., Inc.

Overview of *Romero*

In *Romero*, a patient's wife, individually and on behalf of the patient and their three minor children ("Plaintiffs") sued Columbia Kingwood Medical Center for (1) negligence in delaying a blood transfusion during surgery, and (2) malicious credentialing of the surgeon. 166 S.W.3d at 214. In support of their claims, Plaintiffs presented evidence that the surgeon (Baker) who treated Romero had a history of

¹⁰ For an excellent discussion of the difference in submission of an invalid theory of liability and an invalid theory or element merely lacking evidentiary support, see Dan Pozza's article, *The Future of Broad-Form Submission After Harris County v. Smith*, *ADVOCATE*, Summer 2005 (Vol. 31, p. 12).

prescription drug abuse, major medical errors and malpractice lawsuits, and that the hospital was aware of these facts when it credentialed Baker. *Id.* at 216-17.

Plaintiffs alleged Columbia's negligence resulted in a delayed blood transfusion for Romero during surgery, and that it acted with malice credentialing Baker to practice in the hospital. *Id.* at 219. Liability was apportioned by the jury in a single apportionment question tied to yes answers to both the hospital's negligence and malicious credentialing. The jury apportioned responsibility for the injury forty percent (40%) to hospital, forty percent (40%) to the operating doctor and twenty percent (20%) to the anesthesiologist. *Id.* The jury awarded actual damages of \$28.6 million and punitive damages of \$12 million. *Id.*

The court of appeals reversed and remanded, holding that there was no evidence to support the jury's finding of malicious credentialing, and because the apportionment question was based in part on the credentialing question it could not determine the extent to which the jury's allocation of responsibility rested on the credentialing finding. *Id.* at 220. The court remanded the case for a retrial on the question of negligence. *Id.* The Texas Supreme Court affirmed the court of appeals' decision.

Applying *Casteel* to Chapter 33 apportionment questions.

The Texas Supreme Court agreed with the court of appeals: because the jury was allowed to consider in a single apportionment question two theories of liability as to the hospital, one of which the Court determined was invalid (malicious credentialing), broad form submission of a single percentage allocation question was error. Justice Hecht, writing for the court, held that "[t]he jury could logically have thought the hospital responsible to a lesser

degree had they been permitted to consider only the hospital's negligence." *Id.* at 215..

The supreme court rejected the idea that the apportionment question was submitted in proper broad form "as required by Rule 277 of the Texas Rules of Civil Procedure." *Id.* The court concluded that "broad forms of submission cannot be used to put before the jury issues that have no basis at law or in the evidence . . . The significant benefits of broad forms submission neither necessitate nor justify *misleading* the jury. . . ." *Id.* (emphasis added). The supreme court affirmed the court of appeals' reversal and required a new trial on the negligence claim against the hospital.

The supreme court noted that "[s]ince there was no evidence of malicious credentialing, the jury should not have been allowed to consider that claim in setting Columbia's percentage of responsibility." *Id.* at 224-25. In determining whether that error "probably caused the rendition of an improper judgment" under Rule 44.1(a) of the Texas Rules of Appellate Procedure, the majority held:

Had the jury been confined to considering Columbia's role in causing Romero's injury by negligently delaying a blood transfusion for him during surgery, it may well have decided on a figure other than forty percent. Indeed, the Court of Appeals finds it hard to believe that the forty percent liability the jury attributed to [Columbia] in question 3 was not based (1) partly on the liability it found for negligence (question 1) and (2) partly on the liability found for malicious credentialing (question 2).

Id. at 225-26.

The supreme court further noted the court of appeals' finding: "We do not have to guess at the erroneously submitted question's impact on the liability or damages.... We know with almost certainty that it did impact the answers." *Id.* at 226. The supreme court, therefore, observed that the court of appeals held the error in the apportionment question was reversible under Rule 44.1(a)(1). *Id.*

In *Romero*, Plaintiffs argued that because there was evidence entirely separate from their malicious credentialing claim to support the jury's finding that Columbia was forty percent at fault, any error in submitting the apportionment question cannot be said to have probably resulting in an improper judgment. *Id.* Justice Hecht relied on *Casteel* to reject this argument:

Even if the jury could still have made the same apportionment of fault, the error in the question is nevertheless reversible because it effectively prevents Columbia from complaining on appeal that it *would not* have done so. Thus, in *Crown Life Ins. Co. v. Casteel*, we held that "submitting invalid theories in a single broad form jury question is harmful error when it cannot be determined whether the jury based its verdict on one or more of the invalid theories."

Id.

The supreme court concluded that "[h]aving found malicious credentialing, the jury [could not] conceivably have ignored that finding in apportioning responsibility...unless the appellate court [was] 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,' the error [was] reversible." *Id.* at 227.

Plaintiffs argued that the rule being adopted by the majority required separate submission “of every theory of liability, every combination of theories, and every combination of defendants together with separate apportionment and damage questions for every theory, combination of theories, and combination of defendants.” *Id.* at 230. In *Romero*, the jury charge would have needed to include more than 175 issues – for just four defendants. *Id.* Justice Hecht rejected this notion: “This is simply untrue. The jury charge in this case needed *one less question*—the question on malicious credentialing for which there was no evidence—to be free of error, and reversal could have been avoided with one more question, which the trial court offered the *Romeros* and they rejected.” *Id.* (emphasis in original).

Justice Hecht then put this burden on any plaintiff:

If at the close of evidence the party continues to assert a claim without knowing whether it is recognized at law or supported by the evidence, the party has three choices: he can request that the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether. The *Romero*’s argument assumes that it is so commonplace to come to the end of a jury trial and have no idea what claims are legally and factually valid; that the only safe course to avoid retrial is to parse out every issue in a separate jury question. Nothing in our review of thousands of verdicts rendered by the juries across the state would

suggest that there is any validity to the assumption.

Id.

Was the Chapter 33 Error Invited?

There was serious question whether Columbia invited the error. While Columbia objected to a single apportionment question, it also *objected to two apportionment questions*, as had been suggested by the trial court. The majority’s opinion describes the following colloquy at trial:

[Columbia’s counsel]: “In question no. 3 we object to... inclusion of the question no. 2 inquiry... what we believe is a *legally non-viable theory* – which is the *malice* issue ... along with the negligence theory resulting in a single percentage inquiry...”

The Court: “That is why I want to submit a separate percentage question for you.”

[Columbia’s counsel]: “Well, I understand that, your Honor.

The Court: “No one wanted it.”

[Columbia’s counsel]: “We think that is equally inappropriate as particularly a comment on the weight...”

The Court: “I would be glad to cure that for you.”

[Columbia’s counsel]: “Your honor, we discussed this yesterday afternoon and I think at that time indicated that I do not want to sandbag the court.”

The Court: “Now, I understand you are making the objection, but you know it is my belief that there *ought to be two predicate questions*.”

[Columbia’s counsel]: “*Two causation questions?*”

The Court: “*Two Question No. 3 [the proportionate responsibility] questions.*”

[Columbia’s counsel]: “*Two percentage questions?*”

The Court: “*Two percentage questions. And that would cure the problem.*”

[Columbia’s counsel]: “I understand the court’s position.”

The Court: “OK.”

[Columbia’s counsel]: “*We also believe that is inappropriate, but be that as it may, I understand the Court did tender to us two percentage questions.*”

[The Romero’s counsel]: “Your Honor, I am not sure I understand the objection, because although the court suggests having two percentage questions, *I understand Columbia to be telling the Court they would object to that question*, but they also objected to this question.

The Court: “*Right.*”

[The Romero’s counsel]: “Under [*Casteel*] because it supposedly includes an improper –

The Court: “Yes, but you objected to two percentage questions, too. I just want that to be clear on the record.” *Romero*, 2005 WL 1252748, at *13. (Emphasis added)¹¹

The *Romero* majority found that the hospital properly preserved its objection, leaving unaddressed whether Columbia actually invited the error.

Caught Between A *Duenez* Rock and A *Romero* Hard Place

In *Bedford v. Moore*, the court of appeals used opposite reasoning from that in *Romero* to affirm a take-nothing judgment against plaintiffs. See *Bedford v. Moore*, 166 S.W.3d 454 (Tex. App.—Fort Worth 2005, no pet.). In *Bedford*, a party was struck by a gravel truck driven by the defendant as the party left a convenience store. *Id.* at 457. The defendant tested positive in a drug screen for methamphetamines shortly after the accident. *Id.* An employee of Western Contractors owned the truck driven by the defendant; the truck was being leased to Western. *Id.* at 458. Prior to the incident, the defendant had been involved in two other accidents and received more than ten speeding citations over eight years as a commercial driver. *Id.* The evening before the accident, the defendant had been up all

¹¹ A party cannot lead a trial court into error and then complain about it later upon appeal. *Litton Indus., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984).

night waiting in the emergency room at a local hospital as a result of a head injury. *Id.* The defendant arrived for work on the day of the accident with a bandaged head and had nine stitches. *Id.* Yet, she was allowed to drive the truck. The jury found the claimant sixty percent (60%) negligent and Defendant driver forty percent (40%) negligent, resulting in a take nothing judgment; the trial court failed to submit the allegedly negligent employer's negligence or percentage. *Id.* at 458-59.

The court of appeals affirmed, holding the trial court's failure to submit an issue to the jury concerning Western Contractor's alleged negligent entrustment and negligent hiring, though error under *Duenez*, was immaterial, because the jury had already determined that claimant was sixty percent (60%) responsible for the accident. *Id.* at 464. Compare this result with the conclusion in *Romero* ("We know with almost certainty that [improper submission] did impact the answers.") The supreme court's decision in *Romero* came one day after the court of appeals decision in *Bedford*. It is left for a later court to reconcile these two very different approaches to a faulty submission's effect *vel non* on jury deliberations.

Apportioning Claims or Harm?

Section 33.003(a) states that the trier of fact "*as to each cause of action asserted, shall determine the percentage of responsibility . . . with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought.*" TEX. CIV. PRAC. & REM. CODE § 33.003(a) (emphasis added). Unfortunately, this statutory language is not clear as to whether it is the damages or the liability that is to be apportioned. Although the PCJ indicates that the proportionate responsibility question should be predicated

on a "yes" answer in a liability question, *See* PCJs 4.3, 51.4, 110.32, it is not clear whether that is the proper predicate.

The Texarkana court of appeals recently addressed this language in *Isaacs v. Bishop*, 249 S.W.3d 100 (Tex. App.—Texarkana, pet. filed). In *Isaacs* the issue was whether the trial court committed error when it refused to submit an all-inclusive proportional responsibility issue across multiple causes of action. The Texarkana Court of Appeals, relying on the "as to each cause of action asserted" language in §33.003(a), held:

We find unfounded [appellant's] argument that Section 33.003 of the Texas Civil Practice and Remedies Code absolutely requires a lump submission. The statutory mandate is described as not being discretionary; failing to correctly apply the law is an abuse of discretion. The statute does not, as [appellant] argues, require damages for all causes of action to be combined in a single unified recovery. The *statute explicitly requires proportionate responsibility to be determined as to each cause of action.* While a single submission would be simpler, if it can be done fairly and accurately, here such a submission would not be fair or accurate. Merging damages from different causes of action and then requiring percentages be derived for damages not attributable to all defendants would *actively create error*. The trial court did not abuse its discretion by deciding not to give a single, unified proportional responsibility charge covering all causes of action.

Id. (emphasis added, internal citations omitted). Therefore, the court read § 33.003(a) to require apportionment as to each claim – not as to damages – even if different claims give rise to the same measure of damages. In cases involving multiple theories of liability, this could result in quite a few apportionment questions for the jury’s consideration – and those apportionment questions could result in different assigned percentages to the various players, despite the fact that the damages are the same for each cause of action.

The Texas Supreme Court has not addressed this particular question (although it could in *Isaacs*).

Defining proportionate responsibility for the jury.

The Texas Pattern Jury charge provides a standard jury submission for apportioning responsibility among various tortfeasors. See TEX. PATTERN JURY CHARGE 4.3 (2006 ed.). At least one court has approved of this pattern submission, and rejected the argument that the trial court erred by failing to define further the term “percentage of responsibility.” *Frazier v. Honeywell Int’l, Inc.*, 518 F. Supp. 2d 831, 839 (E.D. Tex. 2007).

V. Submitting the Players.

Chapter 33 provides that the court will submit each claimant, defendant, settling party and designated responsible third party in the jury charge. TEX. CIV. PRAC. & REM. CODE § 33.003(a). But getting each of these players into the jury charge and keeping them there involves presents more than one challenge.

What is the standard for submitting a settling person or responsible third party to the jury, and is it any different than other jury submissions? Is the “causation” requirement different? What

evidence should be introduced to support the RTP submission? Are current or superseded pleadings enough? What is the distinction between nonsuited and settling co-defendants? Are there special problems related to designating and submitting criminal RTPs? Any of these issues can arise in the court of a tort case, and counsel must be prepared to address them.

Is “causing or contributing to cause in any way” the same thing as proximate cause or producing cause?

Numerous cases have held that submission of a plaintiff’s comparative responsibility requires proof of proximate cause. See, e.g., *Moore v. Kitsmiller*, 201 S.W.3d 147, 151 (Tex. App.—Tyler 2006, pet. denied); *Dagley v. Thompson*, 156 S.W.3d 589, 591-92 (Tex. App.—Tyler 2003, pet. denied); *American Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 126-27 (Tex. App.—San Antonio 1984, no writ) (trial court properly disregarded jury finding that plaintiff was 40% negligent and defendant 60% negligent when jury did not find plaintiff’s actions to be a proximate cause of the harm). Proximate cause requires proof of both cause in fact and foreseeability. See *City of Gladewater v. Pike*, 727 S.W.2d 514, 517 (Tex. 1987). The test for cause in fact is whether the negligent act or omission was a substantial factor in bringing about an injury without which the harm would not have occurred. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995). Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *Id.* at 478.¹²

¹² PIC 2.4 defines proximate cause as “that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be

But Chapter 33's causation requirement does not seem to track the language normally associated with proximate cause. Chapter 33 prohibits "submission to the jury regarding conduct by any person without sufficient evidence to support the submission." TEX. CIV. PRAC. & REM. CODE §33.003(b). But what constitutes "sufficient evidence"? Chapter 33 states that the jury "shall determine the percentage of responsibility . . . with respect to each person's *causing or contributing to cause in any way* the harm for which recovery of damages is sought. TEX. CIV. PRAC. & REM. CODE § 33.003(a) (2003). This broad language begs the question of what causation evidence is required. Although it is clear that a designating defendant must show evidence of causation to submit a responsible third party or settling person in the charge, the "in any way" language does not track – and arguably appears broader than – the proximate cause standard.

Also note that the Texas Supreme Court recently rejected the Pattern Jury Charge's definition of "producing cause" in a manufacturing defect case. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 45-46 (Tex. 2007). The Texas Supreme Court rejected PCJ 70.1, which defined producing cause as "an efficient, exciting, or *contributing cause* that, in a natural sequence, produces the incident in question. There may be more than one producing cause." *Id.* at 45 (quoting TEX. PATTERN JURY CHARGE 70.1). The court held that the jury should have instead been instructed that "producing cause" means a cause "that is a substantial factor that brings about injury and without which the injury would not have occurred." *Id.* (quoting *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998)).

more than one proximate cause of an event." TEX. PATTERN JURY CHARGE 2.4 (2006 ed.).

How the different causation language in the § 33.003(a), "producing cause," and "proximate cause" standards remains to be seen.

"Applicable standard of care."

Chapter 33 provides that the court should submit to the jury the responsibility of any person who causes or contributes to causing the harm in any way, "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 § 33.003 (emphasis added). The Texas Supreme Court recently addressed this language in *Providence Health Center v. Dowell*, No. 05-0386, 2008 WL 2154093 (Tex. May 23, 2008).

In *Dowell*, the plaintiffs asserted wrongful death and survival claims against the defendant hospital and physician for discharging their son, who had been admitted following an attempted suicide. Following the discharge – three hours after the first suicide attempt – the patient succeeded in his suicide attempt 33 hours later. *Id.* at *1-2. The plaintiffs argued that the defendants' failure to properly evaluate and retain the patient caused his death. *Id.* at *5. The trial court submitted the negligence of the hospital, the treatment center and the treating physician, and the jury apportioned fault at 40%, 40% and 20% respectively. *Id.* Over the defendants' objection, the court refused to submit the fault of the patient or his parents. *Id.*

In the main opinion, the court held that the patient's discharge was not a proximate cause of the patient's death, but did not reach the Chapter 33 issue. *Id.* at *5. Justice Wainwright, concurring in part and dissenting in part, separately addressed the

issue of the patient's conduct as a contributing factor in his death. *Id.* ("I write separately because the trial court erred in failing to include [the patient] in the negligence and proportionate responsibility questions."). Justice Wainwright concluded that although the trial court did not err in refusing to submit the parents, the court should have submitted the patient's fault.

Considering the parent's conduct, Justice Wainwright noted that the defendants had argued that the parents had failed to stay with their son in the hours after his discharge. *Id.* at *6. But generally "there is no duty to control the conduct of third persons." *Id.* (citing *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)). Because the patient was an adult, the parents had no duty to supervise his actions, therefore they did not violate an "applicable duty" warranting submission under Chapter 33. *Id.*

With regard to the patient's conduct, the parents argued that Texas law prohibits juries from considering the negligence of people who commit suicide. *See id.* (quoting TEX. CIV. PRAC. & REM. CODE § 93.001 ("[I]f [a] person's] suicide or attempted suicide was caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard, then such suicide or attempted suicide shall not be a defense.")). Justice Wainwright concludes that § 93.001 does not prohibit the jury from considering the decedent's conduct "apart from the act of committing suicide" in apportioning fault for the purposes of Chapter 33 as long as that conduct "violated an applicable standard of care (such as negligence)." *Id.* at *7. Justice Wainwright noted that the patient had not taken his prescribed medications or stayed with family members following his discharge as instructed, and concluded that a jury could have determined that the patient's

failure to follow these instructions "was a contributing cause of his death." *Id.*

Justice O'Neill, joined by Justices Medina and Chief Justice Jefferson, dissented, arguing that the evidence supported the jury's liability findings, and that the jury could not have found the patient negligent, based on evidence that his mental condition was impaired. *Id.* at *8-12.

Presenting evidence regarding responsible third parties and settling parties.

Just because a co-defendant has not yet settled, or a named defendant properly joins or designates a joint tortfeasor as a RTP doesn't necessarily create a blank in the jury charge for that RTP or co-defendant, should they settle: there must also be evidence to support the submission to the jury. TEX. CIV. PRAC. & REM. CODE §33.003(b).

The Corpus Christi Court of Appeals recently considered this issue in *Tex. Dep't of Public Safety v. Boswell*, No. 13-06-327-CV, 2007 WL 2471447 (Tex. App.—Corpus Christi Aug. 31, 2007, no pet.). In *Boswell*, DPS argued that the trial court erred in refusing to submit a blank in the charge for a properly submitted RTP. *Id.* at *2. The court first looked to the timing of the designation, which was well before the 60-day deadline in § 33.004(a). *Id.* "Therefore, the court was required to grant leave to designate" the RTP. *Id.* But that didn't end the enquiry: the court then considered whether there was sufficient evidence to submit the RTP in the charge. *Id.* at *2-*3. The court reviewed the evidence and concluded that the record contained sufficient evidence to support the submission of the RTP in the charge, because there was evidence that the RTP caused the harm for which the plaintiff sought recovery. *Id.* at *5. But had the

record not contained sufficient evidence to support the submission, there would have been no error.

This evidentiary burden can lead to strange bedfellows. A plaintiff's desire to limit the number of potential tortfeasors in the jury charge and a defendant's desire to expand the number of tortfeasors with whom it will share responsibility therefore creates interesting incentives: a defendant may be forced to make a case against a co-defendant (who may be an employee or affiliate) in case of settlement or non-suit, while the plaintiff may be arguing against it.

If there is a chance that the plaintiff might non-suit or settle with a co-defendant, or does not want to submit a blank for the RTP's share of fault, the named defendant must be certain to develop and present evidence of causation—otherwise, he may find himself alone in the jury charge. This may put the defendant in an uncomfortable position with respect to joint defense strategies (which will also require counsel to assess the status of conflicts and privileges).

Defendants should also beware of being lulled into complacency when the plaintiff appears to have identified all of the potential liable defendants in its complaint. Should the plaintiff not develop evidence against those defendants and then nonsuit on the eve of or during trial (even less than sixty days after the deadline for designating RTPs), the remaining named defendants may find themselves alone in trial because there is no evidence to submit the responsibility of RTPs or settling persons to the jury. Defendants should protect themselves against this scenario in discovery and at trial by observing the plaintiff's development of the evidence against all defendants—and by conducting their own discovery if necessary to support a submission of a co-defendant's fault.

Who can claim RTP designations for the purposes of the jury charge?

In *Coachmen Indus. v. Alternative Serv. Concepts L.L.C.*, No. H-06-0892, 2008 WL 2787310 (S.D. Tex. July 15, 2008), a federal district court considered whether responsible third parties designated by one defendant are also available for non-moving defendants for apportionment of liability where the defendants are being sued for the same harm. The Court noted that Chapter 33 states that “*the* defendant” seeking to designate responsible third parties bears the initial burden of establishing a factual basis demonstrating the named party's potential responsibility for the claimant's damages. TEX. CIV. PRAC. & REM. CODE §§ 33.004(g)(1), (2) (emphasis added). However, “[a]fter adequate time for discovery,” and upon a motion to strike the third party designations, “*a* defendant” may respond in opposition and produce evidence of the designated parties' potential responsibility for the claimant's harm. TEX. CIV. PRAC. & REM. CODE § 33.004(l) (emphasis added). The Court, finding this distinction to be dispositive, held as follows:

[O]nce leave has been granted to designate a responsible third party, that designated party is available for apportionment of fault by any defendant, provided that--after discovery and prior to submission of the case to a fact finder, and upon a motion to strike the designation due to lack of evidence--some defendant points the court to evidence sufficient to raise a genuine issue of fact regarding the designated party's potential liability for the plaintiff's harm, as that “harm” was initially defined and supported by the moving defendant.

Interestingly, the district court found that its holding was “buttressed” by “the preference in Texas for broad-form submissions of apportionment questions....” *Id.* (citing *Romero*, 166 S.W.3d at 215).

The court also stated in a footnote that it was not deciding “whether responsible third parties may be available to non-moving defendants for apportionment of liability for “harms” different from those identified by the defendant who initially moved to designate third parties.”

Appealing the trial court’s failure to submit a player in the charge.

At least one court has held that erroneous refusal to grant leave to designate a responsible third party is not subject to mandamus relief, concluding that the complaining party has an adequate remedy by appeal. *In re Wilkerson*, No. 14-08-00376-CV, 2008 WL 2777418, at *2 (Tex. App. Houston [14th Dist.] June 6, 2006, orig. proceeding). The petitioner subsequently filed a petition for writ of mandamus in the Texas Supreme Court, which has requested a response by August 18, 2008. Stay tuned!

VI. The Limitations Loophole and other Timing Traps.

Challenges: What are the major deadlines for Chapter 33? What is the current state of the limitations loophole in Chapter 33?

Timelines for Designating Responsible Third Parties

RTP Practice Under the 1995 Act.

RTP practice under the 1995 Act defined a RTP as a person (1) over whom the court in the primary lawsuit could

exercise jurisdiction, (2) who could have been, *but was not*, sued by the plaintiff, and (3) who is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant. TEX. CIV. PRAC. & REM. CODE § 33.011(6) (1995). A RTP that was previously sued but is not longer in the case cannot be joined. *Builders Transport, Inc. v. Grice-Smith*, 167 S.W.3d 18, 19-20 (Tex. App.—Waco 2005, pet. filed).

If a defendant identifies a joint tortfeasor whose responsibility should be submitted to the jury, under the 1995 Act the defendant is required to formally join the RTP by “timely motion” under § 33.004(a). To be timely, the motion must be made within 30 days after the defendant’s answer is due or before limitations expires on the plaintiff’s claim—whichever is later. The named defendant may join a RTP even if limitations has expired. TEX. CIV. PRAC. & REM. CODE § 33.004(d) (1995).

RTP Practice Under the 2003 Act.

The changes to RTP practice under House Bill 4 were some of the most significant in Chapter 33 practice. Instead of formally joining RTPs, a named defendant may now submit blanks for RTPs who contributed to the plaintiff’s injury: the statute now only requires “designation” of RTPs in order to submit liability. The named defendant must make the motion to designate the RTP at least 60 days before trial—although the court may allow a later designation with good cause. TEX. CIV. PRAC. & REM. CODE § 33.004(a) (2003). The new version no longer requires that the RTP could have been, but was not, sued.

If the defendant believes that the RTP committed a criminal act, the timing is much more restrictive: the defendant must designate no later than 60 days after the filing of the defendant’s original answer. TEX. CIV. PRAC. & REM. CODE § 33.004(j) (2003).

Designating Unnamed Parties.

The defendant may designate a criminal RTP even if the identify is unknown. § 33.004(j)(2). Only § 33.004(j) addresses the designation of an unnamed defendant. It is unclear, however, whether an unnamed civil RTP can be named in the time allowed by § 33.004(a). At least one case has held that § 33.004(a)'s more liberal timing cannot be used to designate unnamed RTPs. *Estate of Figueroa v. Williams*, No. CIV A V-05-56, 2007 WL 2127168, at *2 (S.D. Tex. July 23, 2007). As the court explained:

It is not enough, therefore, for the movants here to merely comply with the requirements of § 33.004(a) in order to designate the unknown third parties. The procedure set forth in § 33.004(a) is applicable by its terms only to named third parties. The sole avenue for designating unknown third parties is set forth in § 33.004(j). In this Court's view, any other reading of § 33.004—for instance, reading the time limits set forth in subsection (a) to apply to both named and unknown third parties—would render subsection (j) superfluous.

Beware the Designation Deadline!

The timing of designation is very important: if the defendant fails to timely designate or join the RTP, the trial court has the discretion to deny the motion and submit the case without a blank for the RTP. *In re: Unitec Elevator Services Co.*, 178 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Even where a designation is initially untimely and the trial is subsequently continued, the trial court may be within its discretion to deny the RTP designation. *American Title Co. of Houston v. Bomac Mortg. Holdings, L.P.*, 196 S.W.3d 903, 908-09 (Tex. App.—Dallas 2006, review granted, judgment vacated, and remanded by

agmt) (continuance of trial setting to a date 60 or more days after defendant had filed its motion for leave to designate RTPs, did not make the motion, which was filed less than 60 days before *original* trial date, timely). Review was granted on this issue in the *American Title* case,¹³ but the parties settled and vacated the judgment by agreement and so the Court has not weighed in as of yet.

On the other hand, a federal district court has held that a § 33.004 designation was timely even though it was made after the court's deadline for adding parties. *Estate of Dumas v. Walgreens Co.*, No. CIV A 3:05CV2290 D, 2006 WL 3635426, at *2 (N.D.Tex. Dec. 6, 2006) (holding that designation after the scheduled deadline would not “materially interfere with the fair and orderly sequence or completion of pretrial proceedings”). But the court did not foreclose the possibility that “in another case the court may invoke the court-ordered deadline for adding parties to deny such a motion.” *Id.* Based on both of these examples, defendants should take care to designate by the original deadline—whether it is based on a scheduling order or a preliminary trial setting—and should not rely on a continuance to render a designation timely.

In another recent case, the court held that the late designation and submission of a responsible third party was harmless error. *Hernandez v. Atieh*, 2008 WL 2133193

¹³ The issue presented in the appeal to the Texas Supreme Court was: Where Section 33.004 . . . mandates that the trial court “shall grant” a motion for leave to designate responsible third parties if “filed on or before the 60th day before the trial date”, did the court of appeals impermissibly abrogate this absolute right by giving the trial court the authority to ignore the sixty-day filing period of §33.004(a) and instead permitting a timely-filed motion to be denied by operation of a scheduling order setting an earlier date for joining new parties, where §33.004 gives the trial court no such authority?

(Tex. App.—Houston [14th Dist.] May 20, 2008, no pet. h.), the appellate court held that the trial court’s allowance of a defendant to designate a responsible third party after the close of evidence, but before the case was submitted to a jury was not reversible error. The jury found that the defendant’s negligence did not proximately cause the traffic accident, and that the responsible third party’s negligence did proximately cause the accident. Since the jury was instructed that there could be more than one proximate cause of an event, the appellate court found that the jury was not misled by the responsible third party submission, and thus the verdict was not improper.

New Timeline for Unseating the RTP.

Even though the designation rules are more liberal than the 1995 version, plaintiffs under the new act also has the opportunity to challenge the RTP’s designation. TEX. CIV. PRAC. & REM. CODE § 33.011(6) (2003). The plaintiff must act quickly however—it has 15 days after the designation to file an objection to designation on the basis that the named defendant has not plead sufficient facts to warrant submission of the RTP’s liability to the jury. TEX. CIV. PRAC. & REM. CODE § 33.004(f) (2003).

If there is no objection within 15 days, the court “shall” grant leave to designate the RTP. *Id.* If the objection is timely filed, the court will grant leave to designate the RTP if the defendant establishes sufficient facts to support the RTP’s submission. The defendant gets two bites at this proverbial apple: the court first looks to whether there are sufficient facts pleaded as to the RTP’s fault, and if the defendant loses that round, the court must allow the defendant an opportunity to replead sufficient facts. TEX. CIV. PRAC. & REM. CODE § 33.004(g) (2003). If a plaintiff fails to object to the motion to

designate, it “obviates the need for the Court to determine whether Defendants have established the elements set forth in § 33.004(g).” *Estate of Figueroa v. Williams*, No. CIV A V-05-56, 2007 WL 2127168, at *1 (S.D. Tex. July 23, 2007).

If the defendant satisfies the pleading requirement to keep the RTP in, the plaintiff has one more chance to rid the case of the RTP: the plaintiff may move to strike the RTP designation if, after adequate discovery, there is no evidence that the RTP is responsible for any portion of the plaintiff’s damages. TEX. CIV. PRAC. & REM. CODE § 33.004(l) (2003). The defendant must present sufficient evidence to raise a genuine issue of fact in order to overcome the motion to strike. *Id.*; see also *Hegwood v. Ross Stores, Inc.*, NO. 3:04-CV-2674-BH(G), 2007 WL 14256, at *2 (N.D. Tex. Jan. 3, 2007) (reviewing evidence submitted following discovery period to determine that a fact question existed as to RTP’s responsibility for the plaintiff’s injuries).

The RTP Limitations Loophole.

Chapter 33 responsible third party practice creates a limitations loophole: if a non-party is beyond the plaintiff’s reach because of limitations, he may still be subject to liability despite the limitations period’s expiration if he is joined or designated as a RTP.¹⁴ TEX. CIV. PRAC. & REM. CODE § 33.004(e); see also *Russell v. Wendy’s Int’l, Inc.*, 219 S.W.3d 629, 636 (Tex. App.—Dallas 2007, pet. dism’d) (referring to Chapter 33’s limitations loophole as a “savings” provision). But plaintiffs must be aware of the timetable: the limitations

¹⁴ The limitations loophole has been held to apply to statutes of repose. See *Pochucha v. Galbraith Eng’g Consultants*, 243 S.W.3d 138, 140-41 (Tex. App.—San Antonio 2007, pet. filed) (limitations loophole applies to 10-year statute of repose).

loophole is only open for a short period after a RTP is joined or designated—after which the opportunity to revive an otherwise barred claim is lost. The time in which to join a RTP for liability purposes depends on which Act applies.

Reviving Barred Claims Against RTPs

Under the 1995 Act, a defendant can join a RTP even if the statute of limitations has expired on the plaintiff's claim. TEX. CIV. PRAC. & REM. CODE § 33.004(d) (1995). But the defendant must do so within 30 days after its answer is due—otherwise, the ability to join the RTP may be lost. For the plaintiff, this creates a limited loophole in limitations: even if the claim would otherwise be time-barred, if a named defendant timely filed a motion to join a RTP, the claimant has 60 days to join the RTP as a liability defendant—and thus avoid limitations. TEX. CIV. PRAC. & REM. CODE § 33.004(e) (1995). The plaintiff's election to join the RTP for liability purposes must be made within 60 days after the RTP joinder under § 33.004(d). *Note re: timing:* the plaintiff's ability to join the defendant under § 33.004(e) may depend on the timeliness of the original RTP joinder under § 33.004(d). See *Luna v. Hottie's Grill & Bar, Inc.*, NO. 13-05-448-CV, 2006 WL 3525282, at *1-2 (Tex. App.—Corpus Christi Dec. 7, 2006, no pet.) (holding that limitations was not revived where original RTP joinder under § 33.004(d) was not timely, even though plaintiff's joinder under § 33.004(e) was timely).

Under the 2003 Act, the statute of limitations is no longer relevant to the timing of the named defendant's motion to designate the RTP. However, the plaintiff still enjoys the opportunity to join the RTP as a formal liability defendant despite the expiration of limitations as long as the plaintiff joins the RTP as a defendant within

60 days of his designation. TEX. CIV. PRAC. & REM. CODE § 33.004(e) (2003).

Interesting Limitations Scenarios

The limitations loophole creates some interesting hypotheticals (which we appellate lawyers love to inflict on unsuspecting trial lawyers). Consider the following scenario: (1) plaintiff sues Defendant #1 before limitations expire but does not properly effect service; (2) Defendant #1 gets out of the case on summary judgment based on the statute of limitations; (3) Defendant #2 (not excited about holding the bag) designates Defendant #1 as an RTP so that his share of the responsibility can be apportioned; and (4) plaintiff promptly invokes § 33.004(e) and argues the statute of limitations is "revived." What result? What if defendant obtains a severance simultaneously to obtaining summary judgment on limitations? Under pre-Chapter 33 versions, the language only allows RTP designation if the RTP was not sued by the plaintiff; this language is not in the current version of Chapter 33, and thus there appears to be no impediment.

Also consider the situation of legal malpractice claims: the unwary plaintiffs lawyer neglects to timely join a defendant following RTP designation under § 33.004. The RTP is assigned a certain percentage of liability—but the plaintiff cannot collect because the claims are time barred and mere designation does not create liability. TEX. CIV. PRAC. & REM. CODE § 33.004(i). If the plaintiff pursues tort claims against the lawyer, can the lawyer designate the RTP from the first case as a RTP in the malpractice case?

And in medical malpractice claims, how does the Chapter 33 limitations savings clause comport with Chapter 74's restriction that "[n]otwithstanding any other law . . . no health care liability claim may be

commenced unless the action is filed within two years” TEX. CIV. PRAC. & REM. CODE § 74.251. Although there is some legislative history suggesting an intent that Chapter 33.004 would still apply and allow joinder of the RTP outside the 2-year limitations period, the plain language in § 74.251 seems to suggest exclusion of “any other law.”

VII. Settlement Credits.

Challenges: How does one elect them under the pre- and post-2005 Act, and how does one apply them to multiple plaintiffs and multiple defendants?

Timing of elections of settlement credits.

In *Whatley v. Lindeman, Inc.*, the appellant claimed that the appellee failed to make a timely election for the dollar-for-dollar settlement credit, since this request was not made until after closing arguments had begun, but before they were completed. *Whatley v. Lindeman, Inc.*, No. 04-04-00351-CV, 2005 WL 291469 (Tex. App.—San Antonio Feb. 9, 2005, pet. denied). The September 1, 2003 version of Section 33.014 required election “before the issues of the action [were] submitted to the trier of fact.” TEX. CIV. PRAC. & REM. CODE §33.014 (Vernon 1995). The *Whatley* court found that “Rule 272’s language was different” and followed language in a Houston court of appeals’ opinion. *Id.* (noting that Rule 272 requires objection to the charge to be made “before the charge is read to the jury”); see *Knowlton v. United States Brass Corp.*, 864 S.W.2d 585, 598 (Tex. App. – Houston (1st Dist.) 1993, *aff’d in part and rv’d in part on other grounds*, 919 S.W.2d 644 (Tex. 1996) (“timely submission” had passed once closing argument had been completed).

The appellate court held that election before closing arguments *are completed* is timely. *Whatley*, 2005 WL 291469, at *3. The appellate court also found that the trial court’s determination of the amount of settlement credit is reviewed on an abuse of discretion standard. *Id.* at *2. There were conflicting affidavits regarding the amounts of settlement and how it was allocated, but the decision of the trial court which included the weighing of evidence on proper amount of credit was well within its discretion. *Id.* at *4.

Settlement Credits Under the 2003 Act.

One of the most significant changes in the 2003 Act is the elimination of the “sliding scale” mechanism for determining settlement credits—all settlement credits are determined by percentage responsibility. TEX. CIV. PRAC. & REM. CODE § 33.012(b) (2003). The only exception to this rule is in cases involving a health care liability claim under Chapter 74, in which cases the defendant may elect either a dollar-for-dollar credit or a credit based on the settling defendant’s percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.012(c) (2003).

The 2003 Act revises the definitions section in two ways that impact settlement credits. *First*, the 2003 Act redefines “claimant.” TEX. CIV. PRAC. & REM. CODE § 33.011(1) (2003). The new definition includes any person who “*could* seek recovery of damages.” Thus, a settlement credit under the 2003 Act may not be restricted to settling persons who were actually parties to the lawsuit. Under this new definition, a defendant may want to request damage findings for non-party individuals who *could have* sued, thus decreasing the proportion allocated to the claimants who actually recover.

In addition, the 2003 Act redefines “settling person” to include any person who “has *at any time paid or promised to pay* money or anything of monetary value to a claimant” TEX. CIV. PRAC. & REM. CODE § 33.011(5) (2003). Under the 1995 Act, a “settling person” was defined at the time of submission. Thus, a person can now be defined as a “settling person,” and a settlement credit applied, if settlement occurs after submission.

“Settling Person” under Ch. 33.

Although Chapter 33 broadly defines a settling person as someone who has “at any time, paid or promised to pay money or anything of monetary value” to the plaintiff, there is at least one case that calls the breadth of this definition question. *Ross v. Kia Motors Corp.* involved a suit arising out of a car accident. *Ross v. Kia Motors Corp.*, No. 4:05-CV-381, 2005 WL 3359750 (E.D. Tex. Dec. 9, 2005), *report and recommendation adopted by* 2006 WL 20599 (E.D. Tex. Jan. 3, 2006). Plaintiff, the “next friend” of a deceased minor child and two minor siblings, filed suit against the automobile manufacturer. *Id.* at *1. Kia Motors added the mother of the three children, who had been driving, as a third party defendant under §. 33.016(b). *Id.*

The mother contended she could not be joined, since she was a settling third party with the next friend. *Id.* She introduced a written settlement agreement with the next friend, whereby she agreed to pay \$1,000 for a full release. *Id.* There was no evidence she had actually paid the settlement amount. *Id.* at *3. The court rejected her contention that she could not be joined under § 33.016(b) because of her “settlement,” stating:

The Court is not presently satisfied that [the mother] is a settling

person. ‘Settling person’ is defined as ‘a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought. TEX. CIV. PRAC. & REM. CODE SEC. 33.011(5). Per the terms of the agreement, the money was to be tendered on the effective date. If the money has not yet been tendered, the agreement is not yet effective and [the mother] cannot be a settling person, even though, in a sense, she has promised to pay the \$1000. *Id.*

In a recent case, *B.T. Healthcare v. Honeycutt*, the issue before the appellate court was whether the trial court erred by failing to apply a settlement credit. *B.T. Healthcare, Inc. v. Honeycutt*, No. 07-04-0084-CV, 2006 WL 1359645 (Tex. App.—Amarillo May 18, 2006, no pet.). Prior to trial, IHS Lubbock settled with the plaintiff, leaving Bender as the sole defendant. *Id.* at *1. A jury found Bender 51% liable for the plaintiff’s injuries, while plaintiff was found to be negligent and 49% responsible. *Id.* On appeal, Bender complained that the trial court abused its discretion in refusing to give it a credit equal to “the sum of the dollar amounts of all settlements” as required under Civil Practices and Remedies Code § 33.012. *Id.* The plaintiff argued that the settlement agreement met the requirements of *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998), as it allotted damages not subject to credit. *B.T. Healthcare*, 2006 WL 1359645 at *2. To support this argument, the plaintiff cited one provision in the settlement agreement that specified the particular causes of action related solely to the acts of the settling party.

Id. The appellate court looked to the broad scope of the settlement agreement and the plaintiff's live pleading at the time of the settlement, in which plaintiff stated his intention to hold all defendants jointly and severally liable. *Id.* at *3. Given this evidence, the appellate court concluded that the trial court abused its discretion in refusing to credit the settlement amount against the jury verdict. *Id.*

Settlement Credits Under the 2005 Amendments.

The Texas Legislature again amended Chapter 33's settlement credit provisions in 2005. The court is still required to reduce the claimant's recovery by a percentage equal to the claimant's percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.012(a) (2005). However, as to settling persons, the court no longer reduces the claimant's recovery by the settling persons' percentage of recovery—rather, the claimant's recovery is reduced by a straight dollar-for-dollar credit. TEX. CIV. PRAC. & REM. CODE § 33.012(b) (2005).

This amendment is effective for actions commenced on or after June 9, 2005, or for actions pending on June 9, 2005 in which the trial, new trial or retrial begins on or after June 9, 2005.

Settlement Credits Among Multiple Defendants.

When there is a settlement credit to be split among multiple defendants, the court is to first reduce the plaintiff's total recovery prior to determining each defendant's share of the damages. TEX. CIV. PRAC. & REM. CODE § 33.012.

For example, consider the case where there are three defendants, one of whom settles for \$300,000 ("SD"). Between the SD and the remaining two defendants ("D1" and "D2"), the

jury finds all were negligent, and apportions fault as follows: D1 = 30%; D2 = 60%; SD = 10%. The jury awards \$1,000,000 in damages.

Prior to apportionment, the court is required to reduce the plaintiff's total recovery by the \$300,000 settlement – leaving \$700,000. TEX. CIV. PRAC. & REM. CODE § 33.012(b). The remaining \$700,000 is to be apportioned among D1 and D2: D1 is liable for 10%, or \$70,000. TEX. CIV. PRAC. & REM. CODE § 33.013(a). D2 is responsible for 60% – which means he is jointly and severally liable for the whole \$700,000 sum. TEX. CIV. PRAC. & REM. CODE § 33.013(b). But to the extent D2 overpays, he will have a right of contribution against D1 for D1's \$70,000. TEX. CIV. PRAC. & REM. CODE § 33.015(a). D2 will not have a contribution right against the settling defendant. TEX. CIV. PRAC. & REM. CODE § 33.015(d).

Application of Settlement Credits when multiple plaintiffs seek recovery for the same injury.

In *Sterling Trust Co. v. Adderley*, a number of investors brought suit against a trust company for aiding and abetting fraud under the Texas Securities Act. *Sterling Trust Co. v. Adderley*, 119 S.W.3d 312 (Tex. App.—Fort Worth 2003), *rev'd on other grounds*, 168 S.W.3d 835 (Tex. 2005). The main issue in the case involved aiding and abetting liability standards. *Id.* One of the issues involved how settlement credits were to be applied when there were a number of individual claimants. *Id.* The sixty-nine investors obtained two lump settlements totaling \$425,000.

Since Texas Civil Practice and Remedies Code § 33.012(b)(1) required that the sum of the dollar amount of settlements for each claimant is to be deducted from the claimant's damage recovery, and since the defendant elected a dollar-for-dollar credit,

the trial court divided \$425,000 by 69 to determine a settlement credit of \$6,159.42 per appellee. *Sterling Trust*, 119 S.W.3d at 324; see also TEX. CIV. PRAC. & REM. CODE § 33.001(2)(b)(1) (Vernon 1997). The defendant claimed that using this method, it received a credit of only \$252,536.23 (this is because the damages awarded varied plaintiff to plaintiff). *Id.* The defendant asserted that the credit instead should have been done as a deduction from the lump sum of all damages awarded to the claimants, arguing that the Texas supreme court had previously required using this procedure. *Id.*; *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112, 123 (Tex. 1999). The Fort Worth court of appeals distinguished *Drilex* as involving a family making derivative claims for harm to one family member:

This is not a case like *Drilex*, however, in which multiple persons holding derivative claims combined to form a single claimant for credit purposes. Instead, each appellee is a separate claimant. Thus, each appellee's recovery should be reduced only by the amount of settlement money already received by the appellee/claimant. Therefore, we conclude that the formula set forth in *Drilex* is inapplicable in this case and hold the trial court did not err in allocating settlement credits. *Sterling Trust*, 119 S.W.3d at 324.

Also, in *Taveau v. Brenden*, surviving family members sued a physician and hospital for medical malpractice. *Taveau v. Brenden*, 174 S.W.3d 873 (Tex. App.—Eastland 2005, pet. denied). The appellate court was asked to decide two issues related to a settlement credit after the hospital settled prior to trial and the jury apportioned 75% of the liability to the physician and the

remaining 25% to the hospital. *Id.* at 876. The plaintiffs, in a cross-appeal, complained that the trial court abused its discretion when it treated the plaintiffs as one entity for purposes of applying the settlement credit. *Id.* Since there were no nonsettling plaintiffs in the case, the appellate court found that the trial court correctly applied the entire amount of the settlement against all of the plaintiffs. *Id.* at 881. Further, the plaintiffs complained that the trial court incorrectly applied both a dollar-for-dollar credit and a percentage credit. *Id.* The court of appeals sustained this cross-point, and reversed and remanded the judgment so that the settlement credit could be correctly applied. *Id.*

VIII. Contribution.

Challenges: When, how and against whom can one assert contribution rights, and what is the scope and purpose of Chapter 32?

Introduction.

Contribution is the “payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part. *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977). The right of contribution is available only among joint tortfeasors who caused the same injury. *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 831 (Tex. App.—Austin 2002, no. pet.).

Contribution and Joint Tortfeasors.

Contribution is a derivative claim which arises in favor of the defendant only if there is a third party against whom the plaintiff also has a cause of action. In *Harris v. Tauber*, the court held that in order to obtain contribution, there must be liability from the contribution defendant to the

claimant/plaintiff. *Harris v. Tauber*, No. 09-03-218 CV, 2004 WL 1047263 (Tex. App.—Beaumont 2004, pet. denied). The appellate court concluded that the “[d]efendants’ claim of contribution is derivative of the plaintiffs right to recover from the joint defendant against whom contribution is sought.” *Id.* (citations omitted). Since there was no evidence establishing any liability on the part of the alleged contribution defendant, failure to submit an allocation question to the jury was not error. *Id.*

Therefore, even if a defendant could otherwise show the existence of a joint tortfeasor, no right of contribution exists if that tortfeasor is immune from suit or from liability (in whole or in part), or if the tortfeasor has been freed from the plaintiff’s claim by settlement or judgment. TEX. CIV. PRAC. & REM. CODE § 33.015(d) (“No defendant has a right of contribution against any settling person); *Hudson v. City of Houston*, No. 14-03-00565-CV, 2005 WL 3995160 (Tex. App.—Houston [14th Dist.] Jan. 6, 2005, no pet.) (no reduction of recovery due to parental immunity); *Nacagdoches County v. Fore*, 655 S.W.2d 347, 350 (Tex. App.—Tyler 1983, no writ) (judgment extinguishes contribution right).

However, it should be noted that a settling person is immune from contribution claims only to the extent of settlement—if there is any outstanding claim that is (or could be) brought by the plaintiff as to the same injury, the settling defendant can still be subject to contribution liability for that non-settled aspect of the claim. *C&H Nationwide*, 903 S.W.2d 315, 320 (Tex. 1994). In addition, the settlement rule works both ways—once a defendant settles, it cannot assert a contribution claim against the remaining Defendants. *Int’l Proteins Corp. v. Ralson-Purina Co.*, 744 S.W.2d 932, 943 (Tex. 1988)

Four Contribution Schemes.

Texas common law and statutory contribution schemes.

Texas has four distinct contribution schemes—three based on statute and one created at common law. TEX. CIV. PRAC. & REM. CODE § 32.001 *et seq.* (1986) (the original contribution statute); former TEX. CIV. PRAC. & REM. CODE § 33.001 *et seq.* (1986), amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.04 (the comparative negligence statute); TEX. CIV. PRAC. & REM. CODE § 33.001 *et seq.* (1991) (the comparative responsibility statute); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984) (common law contribution by comparative causation). The comparative negligence statute applies only in pure negligence cases filed before September 2, 1987. The *Duncan* comparative causation scheme applies only to products cases involving strict liability, breach of warranty, and mixed theories of strict liability and negligence tried after July 13, 1983. *Duncan*, 665 S.W.2d at 434. In 1987, the legislature enacted the comparative responsibility statute which merged the comparative negligence statute with the holdings of *Duncan*. TEX. CIV. PRAC. & REM. CODE § 33.001 *et seq.* (1991).

Chapter 32 is the original contribution statute in Texas. It provides:

§ 32.001. APPLICATION.

(a) This chapter applies *only to tort actions*.

(b) This chapter does not apply if a right of contribution, indemnity, or recovery between defendants is provided by other statute or by common law.

§ 32.002. RIGHT OF ACTION.

A person against whom a judgment is rendered has, on payment of the judgment, a right of action to recover payment from each codefendant against whom judgment is also rendered.

§ 32.003. RECOVERY.

(a) The person may recover from each codefendant against whom judgment is rendered an amount determined *by dividing the number of all liable defendants into the total amount of the judgment.*

(b) If a codefendant is insolvent, the person may recover from each solvent codefendant an amount determined by dividing the number of solvent defendants into the total amount of the judgment.

(c) Each defendant in the judgment has a right to recover from the insolvent defendant the amount the defendant has had to pay because of the insolvency.

TEX. CIV. PRAC. & REM. CODE
§§ 32.001-003 (emphasis added).

There is a debate as to whether and to what extent Chapter 32's contribution scheme survives the enactment of Chapter 33. At least one set of authors suggests that Chapter 32 was "repealed" by Chapter 33. See Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Two*, 36 TEX. TECH L. REV. 51, 104, n.257 (2005) (citing Act of May 17,

1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3242-3321, *repealed by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 974 (amended 2003) (emphasis in original). However, the session law cited by these authors does not expressly repeal Chapter 32, and courts continue to cite Chapter 32.

For example, in *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 884 (Tex. App.—Dallas 2007, no pet.), the Dallas Court of Appeals stated that in Texas "[t]here are three types of contribution: common law, statutory under chapter 32 of the civil practice and remedies code, and the comparative responsibility statute under chapter 33 of that code." *Id.* at 887. The court continued that contribution under chapter 32 of the civil practice and remedies code applies only to tort actions and is enforceable by "a person against whom a judgment is rendered." *Id.* Since the plaintiff had settled the original claim against it and thus had not had a judgment rendered against it, the court held that the plaintiff could not assert a contribution claim under Chapter 32. *Id.* So at least according to this case, Chapter 32 is still alive in Texas.

There are several conflicts between Chapter 32 and Chapter 33, including the types of actions to which the statutes apply.

Chapter 32 provides for *pro rata* contribution among joint tortfeasors [TEX. CIV. PRAC. & REM. CODE § 32.003(a)], while Chapter 33 requires the trier of fact to allocate the "percentage of responsibility with respect to (1) each claimant; (2) each defendant; and (3) each settling person." TEX. CIV. PRAC. & REM. CODE § 33.003.

Section 32.003 might become relevant in apportioning contribution among joint

tortfeasors under § 33.013(b), which provides that a “liable defendant is ... jointly and severally liable for the damages recoverable by the claimant ... if: the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent; or [the defendant committed certain intentional acts such as murder, aggravated kidnapping, etc.]” Such a case would be presented by the following hypothetical: There are five defendants, and a jury allocates 55% of responsibility to D1, 30% to D2, and 5% to D3, D4, and D5. Under § 33.013(b), since more than 50% of responsibility was attributed to D1, D1 is jointly and severally liable for the entire judgment, and D1 has a claim for contribution against the remaining defendants. The issue is, how much may D1 collect from D2? Section 33.015(a) provides that a defendant that is jointly and severally liable “has a right of contribution [for any amount paid over and above his percentage of the damages] against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact *equal to that other defendant's percentage of responsibility.*” Thus, under §33.015, D1 would apparently be able to recover 30% from D2, while 32.003 gives D1 only 20% (1/5th). No court has addressed this apparent conflict between these provisions.

Timeline for asserting contribution claims.

The contribution statute does not expressly state when a claim for contribution may be asserted. Prior to 1987, the contribution statute required that the right be asserted in the primary lawsuit. That provision was repealed in 1987, however the question of whether a litigant must assert contribution rights in the primary suit remains uncertain. Citing concerns regarding *res judicata* and

the danger of inconsistent jury findings, one dissent has argued that defendants must still assert contribution rights in the primary suit, or they are waived. *Union City Body Co., Inc. v. Ramirez*, 911 S.W.2d 196, 207-08 (Tex. App.—San Antonio 1995, no writ) (Duncan, J., dissenting). There is also an added danger in not affirmatively pleading rights of contribution in the primary case: although there is no express pleading requirement, some courts have held that a co-defendant loses a right to its unpleaded contribution claim when a codefendant is released from the lawsuit. *See Ohio Med. Prods., Inc. v. Suber*, 758 S.W.2d 870, 872 (Tex. App.—Houston [14th Dist.] 1998, writ denied); *Newsco Serv. Div. of Big Three Indus. Inc. v. Lassman*, 686 S.W.2d 197, 199 (Tex. App.—Houston [14th Dist.] 1984, writ ref’d n.r.e.).

In addition, a recent case held that an insurer had waived its right to seek contribution from co-insurers where it waited until after the primary lawsuit was settled. In *RLI Ins. Co. v. Philadelphia Indem. Ins. Co.*, RLI sued other insurers to recover part of the settlement money it paid after its insured was sued in a wrongful death action. *RLI Ins. Co. v. Philadelphia Indem. Ins. Co.*, 421 F.Supp 956 (N.D. Tex. 2006). The district court found that RLI had waived its contribution rights for two reasons. *Id.* at 969. First, no judgment was ever rendered against any of the insurers. *Id.* Second, RLI did not preserve its contribution rights because it settled the entire wrongful death action. *Id.* Accordingly, the court granted summary judgment in favor of the other insurers on RLI’s contribution claim. *Id.* See also *Coward v. AC and S, Inc.*, 91 Fed. Appx. 919 (5th Cir. 2004) (when a plaintiff dismisses a co-defendant debtor with prejudice, any contribution claim that a non-debtor co-debtor may have against the debtor is eliminated).

Therefore, it is clearly advisable to assume that contribution rights will be waived if they are not asserted (and affirmatively plead at the earliest possible time) in the primary lawsuit.

In addition, like any other affirmative claim, it is subject to the statute of limitations, which begins to run with the accrual of the cause of action. Fortunately, this is not so frightening—a contribution claim accrued with the payment of the adverse judgment—not the accrual of the primary lawsuit. *See Beaumont Coca Cola Bottling Co. v. Cain*, 628 S.W.2d 99, 100 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.).

Intersection of contribution rights with federal claims.

A defendant may not be able to assert contribution rights in cases involving more limited rights of recovery. For example, *In re Enron Corporate Securities Litigation* involved attempts to obtain contribution and indemnity from Lou Pai (his role is described in detail in the excellent book: *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (Penguin Books 2003)). *In re Enron Corporate Securities Litigation*, No. H-01-3624, 2006 WL 1766181 (S.D. Tex. June 16, 2006). Various investment banking and brokerage firms sought to keep Pai in the litigation as a third party. *Id.* at *1. The district court had already dismissed the third party claims against Pai under the federal securities laws. *Id.* The court framed the issue as follows: “[T]he only issue here for Pai’s motion for partial dismissal is whether the Bank Defendants may seek contribution from Pai under Chapters 32 and 33 of the Texas Civil Practice and Remedies Code...if Bank Defendants are found liable for the State Law Claims against them.” *Id.* at *2. The court, after noting there were no cases directly on point, concluded that the

settlement and contribution scheme under the Private Securities Litigation Reform Act (“PSLRA”) trumped Chapter 32 and 33’s contribution and indemnity scheme, and dismissed the state law contribution claims against Pai. *Id.* The court stated, “allowing co-defendants a potential right of contribution under the far more generous Chapter 33 of the Texas Civil Practice & Remedies Code against Pai, who is charged only with federal securities law violations...would conflict with federal law, undermine the purpose of the PSLRA’s expressly restricted contribution provisions, and circumvent the statutes.” *Id.* at *4.

Similarly, in *Mims v. Dallas County*, three former inmates sued Dallas County under the Americans with Disabilities Act, the Rehabilitation Act and 42 U.S.C. § 1983. *Mims v. Dallas County*, No. 3-04-CV-2754-M, 2006 WL 398177 (N.D. Tex. Feb. 17, 2006). Dallas County sought to designate UTMB as a responsible third party under Chapter 33, and UTMB moved to dismiss, arguing that the plaintiff’s claims did not provide a direct action for contribution. *Id.* at *1. The court, summarizing the relevant federal case law, stated:

When a statute creates a private right of action but fails to provide expressly for a right of contribution, particularly if the remedial scheme created is detailed, Congress’s silence with regard to contribution weighs heavily against implying such a right because there is a presumption that the silence reflects congressional intent not to create such a right...Still, the critical inquiry in deciding whether a right to contribution should be implied by the courts is one of congressional intent.

Id. at *4.

The court, finding no evidence that Congress intended for either the ADA or the Rehabilitation Act to provide for a direct action for contribution, dismissed the defendant's third-party complaint as to those claims. *Id.* The court also dismissed the defendant's third-party claim under § 1983, reasoning that allowing third-party claims under the statute would "frustrate the two primary goals of 1983—compensation and deterrence." *Id.* at *5.

Contribution Under the 1995 Act.

Section 33.015 comes into play when one defendant is jointly and severally liable because its share of responsibility is greater than 50%. If that defendant pays more than its actual percentage of liability for the damages (*i.e.*, the jury assessed 75% but the defendant paid 100%), that defendant has a right of contribution from other non-settling co-defendants for the amount of overpayment up to the codefendants' percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.015.

Section 33.016 applies when there is a joint tortfeasor against whom the plaintiff did not seek relief "at the time of submission." TEX. CIV. PRAC. & REM. CODE § 33.016(a). This rule prevents a plaintiff from eliminating a right of contribution by refusing to sue a joint tortfeasor.

Chapter 33 and Rule 38 allow defendants to implead nonparties as contribution defendants into the primary lawsuit. But can you assert contribution rights against a non-party in a subsequent lawsuit if you did not implead? Although the question is unsettled, there is authority that you must formally implead a contribution defendant under § 33.016(b) and Rule 38. *See Casa Ford, Inc v. Ford Motor Co.*, 951 S.W.2d

865, 875-76 (Tex. App.—Texarkana 1997, pet. denied); *see also BDO Seidman, LLP v. Bracewell & Patterson, LLP*, NO. 05-02-00636-CV, 2003 WL 124829 (Tex. App.—Dallas Jan. 16, 2003, pet. denied) ("[C]hapter 33 . . . does not permit a tortfeasor to seek postjudgment contribution from a tortfeasor that was not a party to the primary suit."). But in another case, the Beaumont Court of Appeals held differently: *In re Martin*, 147 S.W.3d 453 (Tex. App.—Beaumont 2004, pet. denied) ("[W]e respectfully disagree with the assertion that Chapter 33 precludes a post-judgment contribution claim against a joint tortfeasor that is not made a party to the primary lawsuit."). The best course, again, is to fully assert all contribution rights pursuant to § 33.016 and Rule 38 against all non-party joint tortfeasors, or risk waiver of the right of contribution against them.

IX. Chapter 33 in federal court.

How are the federal courts treating Chapter 33 these days: procedural or substantive? What does this distinction mean for federal/bankruptcy litigation?

Federal courts apply state substantive law "when adjudicating diversity-jurisdiction claims, but in doing so apply federal procedural law to the proceedings." *Cates v. Sears, Roebuck & Co.*, 928 F.2d 679, 687 (5th Cir. 1991). Whether a particular Chapter 33 provision is procedural or substantive therefore determines whether or not it will be applied to state-law tort claims pending in federal district court. As to RTP practice, there appears to be a conflict among federal district courts about whether § 33.004 or Fed. R. Civ. P. 14(a) governs—but that conflict likely results from the difference between the 1995 Act and the 2003 Act.

1995 Act RTP Practice—Procedural

In *Kelley v. Wal-Mart Stores, Inc.*, 224 F. Supp. 2d 1082 (E.D. Tex. 2002), a plaintiff sued Wal-Mart in Texas state court alleging personal injuries from a slip and fall at the store. *Id.* at 1083. Wal-Mart removed the case to federal court, and filed a motion for leave to file a third-party complaint against Enviro-Kleen Enterprises which the district court granted. *Id.* Enviro-Kleen filed an answer to Wal-Mart's complaint and moved to dismiss the complaint on the basis of Texas's two-year statute of limitations. *Id.* Enviro-Kleen argued that under § 33.004(d) (1995), Wal-Mart had not filed the third party complaint within 30 days of the answer, and thus there was no limitations exception. *Id.* at 1084. The district court rejected this argument, and held that Fed. R. Civ. P. 14(a) governed the timing of third party practice in federal court. *Id.*

In *Guerra v. Microsoft Corporation*, the district court suggested Chapter 33's responsible third party procedures were procedural by noting that Rule 14a of the Federal Rules of Civil Procedure takes precedence with regard to third party joinder practice. *Guerra v. Microsoft Corp.*, No. 3:04-CV-1167-H, 2004 U.S. Dist. LEXIS 21442 (N.D. Tex. Oct. 25, 2004) (using Rule 14 to determine whether to add third party defendants to the case).

In *Marella v. Autozone*, the court interpreted the 1995 version of Chapter 33 and held that it was improper for plaintiffs to hold defendants responsible as third parties without adding them as parties. *Marella v. Autozone, Inc.*, No. Civ. 3:04-CV-1157-H, 2004 WL 2847846, at *2 (N.D. Tex. Dec. 10, 2004) (noting that the pleadings before the court failed to establish that joinder was appropriate under either Texas law or Rule 14 of the Federal Rules of Civil Procedure). In so doing, Judge Sanders stated that § 33.004 is "procedural in nature," such that Rule 14 takes precedence. *Id.* at *1

(nonetheless holding that joinder was not appropriate under either § 33.004 or Rule 14).

2003 Act RTP Practice—Substantive (Mostly)

Recent cases, however, have held that where the 1995 Act is procedural and thus would not be applied in federal courts, the 2003 Act is substantive and will be applied in diversity cases. *Bueno v. Cott Beverages, Inc.*, No. Civ.A. SA04CA24XR, 2005 WL 647026, at *5 (W.D. Tex. Feb. 8, 2005) (explaining that prior to the 2003 amendments to § 33.004 responsible third parties were actually joined as parties to the suit, but that since 2003 responsible third parties are now designated not joined); *see also Becker v. Wabash Nat'l Corp.*, No. C-07-115, 2007 WL 2220961, at *2 n.2 (S.D. Tex. July 31, 2007); *Muniz v. T.K. Stanley, Inc.*, No. CIV.A. L-06-CV-126, 2007 WL 1100466, at *3 (S.D. Tex. Apr. 11, 2007); *Cortez v. Frank's Casing Crew & Rental Tools*, No. CIV. A. V-05-1252007 WL 419371, at *2 (S.D. Tex. Feb. 2, 2007); *cf. Bolden v. Apache Corp.*, No. CIV.A. G-04-345, 2005 WL 1653057, at *3 (S.D. Tex. July 9, 2005) (transferring tort suit to Louisiana district court, and noting that the transferee court could determine whether RTPs should be designated under § 33.004).

For example, in *Cortez v. Frank's Casing Crew & Rental Tools*, No. V-05-125, 2007 WL 419371 (S.D. Tex. Feb. 2, 2007), the Court found that the responsible third party scheme set forth in Chapter 33 does not conflict with third party practice under Rule 14 of the Federal Rules of Civil Procedure. The court, citing *Bueno*, among others, explained:

Under Rule 14, parties may be formally joined, thereby becoming named parties subject to liability. Under § 33.004, however,

responsible third parties are not formally joined. Instead, § 33.004 provides a mechanism to designate responsible third parties who then may be apportioned fault. The designation of responsible third parties ‘does not by itself’ impose liability on these third parties and ‘may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the [third party].’ In fact, entities that are not subject to any legal liability may be designated as responsible third parties...Accordingly, the Court finds that § 33.004, in the relevant part, does not conflict with Federal Rule of Civil Procedure 14. *Cortez*, 2007 WL 419371 at *2 (internal citations omitted).

However, at least one court has expressed reservation about whether *all* of § 33.004 applies in diversity cases. In *Dumas v. Walgreens Co.*, the Court stated that it had previously applied § 33.004 in diversity cases, and that “it will continue to do so until persuaded that the statute does not apply.” *Estate of Dumas v. Walgreens Co.*, No. CIVA 3:05CV2290 D, 2006 WL 3635426, at *1 (N.D. Tex. Dec. 06, 2006) (citing *Alvarez v. Toyota Motor Corp.*, 2006 WL 1522999 at *2 (N.D. Tex. May 8, 2006)). While the Court applied § 33.004 to the extent that it permitted the defendant to add a responsible third party, it expressed reservations as to whether *all* aspects of §33.004 apply in diversity cases. *Dumas*, 2006 WL 3635426 at * 1. Specifically, the Court stated:

Today’s case does not require that the court engage in an extensive analysis of whether § 33.004 should be given full effect, and the

court will apply it. In doing so, the court, as before, suggests no view on such matters as whether the statute’s references to ‘the pleading requirement of the Texas Rules of Civil Procedure,’ see § 33.004(g)(1) (singular), and to ‘the pleading requirements of the Texas Rules of Civil Procedure,’ *Id.* § 33.004(g)(2) (plural), apply in a diversity case. Nor does the court suggest that the provisions of § 33.004 that impose time limitations on seeking leave or objecting to motions for leave would apply in a diversity case to circumvent a scheduling order that imposes other deadlines.

Id.

In addition to the fraud issues discussed in Section I, *supra*, the bankruptcy court in *In re Today's Destiny, Inc.*, 388 B.R. 737 (Bankr. S.D. Tex. 2008) was asked to determine whether a creditor filing a proof of claim is a “claimant” under Chapter 33. Section 33.011 defines “claimant” as:

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.

In holding that a creditor filing a proof of claim is a claimant under Chapter 33, the Court found that “‘claimant’ definition is broad, ‘including,’ not limiting the term to plaintiffs, counterclaimants, cross-claimant or third-party plaintiffs, and including entities who ‘could seek recovery’ but has not yet engaged in litigation. The ‘claimant’ definition’s primary characteristic is that the claimant seeks damages. *Id.*”

The court was also asked to determine whether a proof of claim is a sufficient basis of liability to raise a contribution claim under Chapter 33. The Court answered in the affirmative, citing Section 33.016(b), which provides that a party “may” assert the contribution claim in the “claimant’s action.”

In *Coachmen Indus. v. Alternative Serv. Concepts L.L.C.*, 2008 U.S. Dist. LEXIS 53905 (S.D. Tex. July 15, 2008), discussed in Section III, *supra*, the federal district court found that Section 33.004(a)’s requirement that a motion to designate responsible third parties “must be filed on or before the 60th day before the trial date...” to be “procedural and hence, not binding on this Court.” Accordingly, the district court denied the motion which, although filed more than 60 days before trial, was filed several months after the motion deadline contained in the court’s scheduling order.

X. Chapter 33 and Carefully Constructed Legislative Schemes.

What is the Texas Supreme Court saying these days about the applicability of Chapter 33 to other carefully constructed legislative schemes?

Much has been said and written (by these authors and others) about *Duenez* and the fascinating intersection of Chapter 33 and the Dram Shop Act. What is the state of the law in Texas regarding the applicability of Chapter 33 to other carefully constructed legislative schemes in light of the Texas Supreme Court’s ruling in *JCW*.

In *Southwest Bank*, the Texas Supreme Court held that Chapter 33 did not apply to a Uniform Commercial Code § 3.420 claim for conversion. *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104 (Tex. 2004). The court of appeals had applied the rule of construction that a more specific statutory scheme prevails over the more general Chapter 33 statute. *Id.* The supreme court found that applying Chapter 33’s proportionate responsibility framework to claims involving Article 3 of the UCC, would “disrupt the *UCC’s carefully allocated liability scheme*. . . . A more reasonable construction is that the Texas legislature and the UCC drafters considered and rejected comparative fault. . . .” *Id.* at 108 (emphasis added). The supreme court concluded: “We should not disturb that decision by applying Chapter 33 to those UCC-based conversion claims for which the drafters and legislature chose not to apportion responsibility. *Id.* at 109. The supreme court found that “conversion” under the UCC, while sounding in tort, was not a “tort claim,” triggering Chapter 33’s application. *Id.*”

The *JCW* court, finding that, at least when the damages alleged are for personal injuries, Chapter 33 applied to implied warranty claims brought under Article 2 of the Uniform Commercial Code, distinguished *Southwest Bank* by stating that, “[u]nlike UCC Article 3, Article 2 does not undertake a comprehensive fault scheme.” *Id.* at *13. It is important to note

that the court in *Southwest Bank* focused on the *entire* Uniform Commercial Code's scheme for allocating liability, rather than simply on Article 3, as the Court suggested in *JCW*. A careful comparison between the different provisions of Article 2 and Article 3 fails to provide any basis for such a distinction. In fact, neither Article 2 nor Article 3 actually "apportions" liability despite the language used by the Texas Supreme Court in *JCW*.

Given the *JCW* court's distinction of *Southwest Bank*, it is unclear where Texas law will end up when confronted with the issue of the applicability of Chapter 33 to a carefully crafted legislative scheme, although it is a good bet that it will end in a way most disadvantageous to plaintiffs asserting personal injury claims.

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