

PROPORTIONATE RESPONSIBILITY AND OTHER FRIGHTS!

GEORGE PARKER YOUNG

Haynes and Boone, LLP
201 Main Street, Suite 2200
Fort Worth, Texas 76102

KENDYL T. HANKS

Haynes and Boone, LLP
901 Main Street, Suite 3100
Dallas, Texas 75202

and

153 East 53rd Street, Suite 4900
New York, New York 10022

JOSH BORSELLINO

Haynes and Boone, LLP
201 Main Street, Suite 2200
Fort Worth, Texas 76102

State Bar of Texas

29TH ANNUAL ADVANCED CIVIL TRIAL COURSE

August 30 – September 1, 2006 - *Dallas*

September 20-22, 2006 – *San Antonio*

November 8 – 10, 2006 – *Houston*

CHAPTER 4

GEORGE PARKER YOUNG
Email: George.Young@haynesboone.com

PROFESSIONAL ACTIVITIES:

Of Counsel, Haynes and Boone, LLP

Argued landmark 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 counsel in the following HMO cases: *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); Special Counsel to Attorney General, *Corporate Health Ins., Inc. v. Texas Department of Ins.*, 12 F.Supp.2d 597 (N.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). *Furstonberg v. Mintz*, 170 F.Supp.2d 695 (N.D. Tex. 2001); *Carpenter v. Harris Community Health*, 154 F.Supp.2d 928 (N.D. Tex. 2001); *Plocica v. NYLCare of Texas, Inc.*, 43 F.Supp.2d 695 (N.D. Tex. 1999); *Cyr v. Kaiser Foundation Health Plan of Texas*, 12 F.Supp.2d (N.D. Tex. 1998).

First attorney to successfully use Texas 1997 law which prohibits financial incentives that act as an inducement to limit care; filed first suit under Texas' 1997 HMO Liability Act; obtained first verdict and judgment (over \$13 million) against HMO under Texas' 1997 HMO Liability Act (later reduced on appeal).

Finalist, 2003 Trial Lawyer of the Year; *Trial Lawyers for Public Justice* (one of eight cases nominated nationally).

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

2004 and 2005 "Top Attorneys in Tarrant County" selected by the *Fort Worth Business Press* (less than 3% of Tarrant County attorneys); 2004, 2005 "Top Attorneys in Tarrant County" by *Fort Worth Magazine*.

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

SELECTED SEMINARS AND PAPERS FROM LAST SIX YEARS:

Nov. 2005: "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)"

Sep 2004: "Preparing to Take Depositions," and "Taking Depositions," *ADVOCATE*, State Bar Of Texas Litigation Section Magazine (co-authored with Walker C. Friedman)

Sep 2003: American Conference Institute: "The Most Common Causes of Action Today"

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

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 and 12 Tricks

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

EDUCATION AND OTHER PROFESSIONAL:

B.A. in History, Southwestern University 1979; J.D., Texas Tech School of Law 1982.

Numerous news interviews on HMO issues, including *ABC Evening News*, *NBC Nightly News*, *CBS News*, *PrimeTime Live*, *CNN*, *Good Morning America*, *Today Show*, *NPR*, *Business Week*, *Solon*, *Dallas Morning News*, *LA Times*, *New York Times*, *Washington Post*, *Austin American Statesman*, *Fort Worth Star Telegram*, and *Texas Lawyer*.

Board Certified – Civil Trial Law, Texas Board of Legal Specialization. Licensed: U.S. Supreme Court, Fifth Circuit Court of Appeals, Northern, Southern and Western Districts of Texas, Federal Circuit Court of Appeals.

KENDYL T. HANKS
Haynes and Boone, LLP
153 East 53rd Street, Suite 4900
New York, NY 10022
and
901 Main Street, Suite 3100
Dallas, Texas 75202-3789
Telephone: (214) 651-5705
Facsimile: (214) 200-0575
E-mail: kendyl.hanks@haynesboone.com

Kendyl Hanks is an associate with Haynes and Boone's Appellate Section.

Born and raised in Houston, Texas, Kendyl received a B.A. in politics, with honors, from Princeton University in 1997. After a year in Washington, D.C. working in the 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.

Kendyl joined Haynes and Boone's business litigation practice in Austin upon graduation from law school. In 2003 she moved to Dallas to become a member of the firm's appellate practice. She currently practices in Haynes and Boone's New York and Dallas offices. 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.

Kendyl in 2002-03 coached the University of Texas law school ABA moot court team to national finals out of more than 130 teams. In 2004, the Travis County Women Lawyers Association awarded to Kendyl their annual Pro Bono Award in recognition of her work on a test case under new Texas consumer protection laws, which she litigated through trial and judgment, for a low-income Austin area family. In May, 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 is also active in the bar. She currently serves as the Communications Director for the American Bar Association's Young Lawyers Division, and recently completed a term as one of two District Representatives to the ABA YLD from Texas for the 2005-06 bar year, during which time she won three awards from the ABA YLD for her service during the Katrina disaster and to the YLD. She is also a Business Law Fellow, and Co-Chair of the Appellate Subcommittee of the Business & Corporate Litigation Committee for the ABA Section of Business Law. She is also serving as the Co-Chair of the Online Member Services Committee for the Texas Young Lawyers Association, which recently recognized her service to TYLA with the TYLA President's Award of Merit.

JOSH BORSELLINO
HAYNES AND BOONE, LLP

201 Main Street, Suite 2200
Fort Worth, Texas 76102
Telephone: 817.347.6600
Fax: 817.347.6650
E-mail: josh.borsellino@haynesboone.com

EMPLOYMENT

Associate, Haynes and Boone's Business Litigation Section

JUDICIAL CLERKSHIP

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

EDUCATION

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

HONORS AND ACTIVITIES

- Senior Fellow, Tulane Legal Research and Writing Program, 2003-04
- Managing Editor, *Tulane Environmental Law Journal*, 2003-04
- Member, Tulane Environmental Law Clinic, 2003-04

PROFESSIONAL ASSOCIATIONS

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

TABLE OF CONTENTS

I.	THE HISTORY OF THE BEAST.....	1
	<i>***Fright Number One*** -- Which version applies?.....</i>	<i>2</i>
II.	COMPARATIVE RESPONSIBILITY: REDUCING THE PLAINTIFF’S RECOVERY.	2
A.	Comparative Responsibility Under the 1987 Act.	2
B.	Comparative Responsibility Under the 1995 Act.	3
C.	Comparative Responsibility Under the 2003 Act.	3
	<i>***Fright Number Two*** -- Chapter 33: procedural or substantive?</i>	<i>3</i>
D.	Comparative Responsibility in “Tort-Like” Cases.	4
	<i>***Fright Number Three*** -- How does Chapter 33 play out in fraud and fraudulent inducement cases?.....</i>	<i>5</i>
E.	Order of Submission: How and When to Submit Negligence and Proportionate Responsibility.....	5
F.	Waiving Charge Error When Submitting Percentage Fault.....	6
III.	RESPONSIBLE THIRD PARTIES: TO JOIN OR TO DESIGNATE?	6
A.	RTP Practice Under the 1995 Act.....	6
	<i>***Fright Number Four***-- Look for (and beware of) the limitations loophole.....</i>	<i>6</i>
B.	RTP Practice Under the 2003 Act.....	7
	<i>***Fright Number Five*** -- What does “contributing to causing in anyway” mean anyway?</i>	<i>7</i>
C.	Still Must Plead and Prove Culpability to Achieve Third Party Submission.....	7
	<i>***Fright Number Six*** -- Don’t forget proximate cause!</i>	<i>8</i>
D.	Mandamus and Responsible Third Party Practice.	9
IV.	SETTLEMENT CREDITS.	9
A.	Settlement Credits Under the 1987 Act and the 1995 Act.....	9
	<i>***Fright Number Seven*** -- Timing of elections of settlement credits.....</i>	<i>10</i>

B. Settlement Credits Under the 2003 Act. 11

Fright Number Eight -- *So you think you're a settling person?* 11

C. Settlement Credits Under the 2005 Amendments..... 12

Fright Number Nine -- *How are settlement credits applied when there are multiple plaintiffs seeking damages arising from the same injury?* 12

V. JOINT AND SEVERAL LIABILITY. 13

A. Joint and Several Liability Under the 1987 Act..... 13

B. Joint and Several Liability Under the 1995 Act..... 13

C. Joint and Several Liability Under the 2003 Act..... 14

Fright Number Ten -- *Abolition of joint and several liability?* 14

VI. CONTRIBUTION. 14

Fright Number Eleven -- *Abolition of joint and several liability?*..... 15

A. Four Contribution Schemes. 15

1. Texas common law and statutory contribution schemes. 15

Fright Number Twelve -- *What is the timeline for asserting contribution rights against codefendants?*..... 16

2. Intersection of contribution rights with federal claims. 16

B. Contribution Under the 1995 Act. 17

Fright Number Thirteen -- *What is the timeline for asserting contribution rights against nonparties?*..... 17

VII. RECENT CHAPTER 33 DEVELOPMENTS..... 18

A. Summary of Major Supreme Court Developments. 18

B. *Duenez*: Proportionate Responsibility, the Dram Shop Act, and Derivative Liability..... 18

1. Legal Issue in *Duenez*. 18

2. Facts of *Duenez*—Supreme Court Opinion..... 18

3. Additional Facts..... 19

4.	Procedural History—Court of Appeals Opinion.....	20
5.	Supreme Court’s Majority Opinion— <i>Duenez</i>	20
6.	The Dissent: A Plain Text Reading?.....	21
7.	Three In the Majority Depart and Rehearing Is Granted.	23
8.	Additional Thoughts About <i>Duenez</i>	23
9.	The Pattern Jury Charge and Other Derivative Liability Cases.	24
10.	Post- <i>Duenez</i> Developments.	25
11.	Other States’ Cases On Submission of Proportionate Responsibility in Derivative Liability Cases.	26
12.	Other Issues of Vicarious and Imputed Liability.....	26
C.	<i>Romero</i> : Chapter 33 and the Demise of Broad Form Submission.....	28
1.	Background of Broad Form Submission.	28
2.	Overview of <i>Romero</i>	28
3.	Chapter 33 Portion of the Majority Opinion.....	30
4.	Was the Chapter 33 Error Invited?	32
5.	The <i>Romero</i> Concurrence.	33
6.	Caught Between A <i>Duenez</i> Rock and A <i>Romero</i> Hard Place.....	33
D.	<i>Battaglia</i> and the Timing of Calculation of Prejudgment Interest: Before or After the Application of Settlement Credits to Past or Future Damages?	34
1.	The Calculation.....	34
2.	The Majority Opinion.	35
3.	The Dissent – A Strict Plain Textualist Approach.....	38
E.	Chapter 33 Applies to Fraud Cases: But What Does That Mean?.....	39
F.	Chapter 33 and the UCC.....	40
1.	Chapter 33 Does Not Apply to a UCC Conversion Claim.	40

2. Chapter 33 Does Not Apply to a UCC Warranty Claim..... 41

****Fright Number Fourteen*** -- Don't give up in a UCC Warranty
Case! 41*

Chapter 33: *Proportionate Responsibility and Other Frights!*

George Parker Young, Haynes and Boone, LLP, Fort Worth

Kendyl T. Hanks, Haynes and Boone, LLP, New York and Dallas

Josh Borsellino, Haynes and Boone, LLP, Fort Worth

Chapter 33 of the Texas Civil Practice & Remedies Code presents a variety of challenging legal and factual issues for even the most seasoned litigator. From the commencement of a lawsuit—in federal or state court—that implicates Texas tort law, counsel must focus on the substance and procedure of Chapter 33, lest an opportunity (or worse, a deadline) pass her by.

The purpose of this article is threefold: (1) to provide a historical view of Chapter 33, in order to better understand its current iteration;¹ (2) to present an update of recent cases construing Chapter 33 provisions; and (3) intermittently to point out Chapter 33 *frights*—those deadlines and pitfalls that stalk the unwary litigator.

I. THE HISTORY OF THE BEAST.

After years of legislative enactments and amendments—including the substantial House Bill 4 of 2003—there are at least seven systems for apportioning tort liability among plaintiffs and defendants depending on when your case was filed (or the construing opinion was issued):

1. The contribution statute, TEX. CIV. PRAC. & REM. CODE ch. 32 (“Chapter 32”);

¹ In writing this paper, the authors relied heavily on two excellent prior works in this area: Kirk P. Watson’s *Lawyer’s Still Trying To Do Math: Proportionate Responsibility, Including the New HB 4*, delivered at the State Bar of Texas’ 2004 Continuing Legal Education Program *Impact of House Bill 4*, and Anne M. Johnson and Kendyl Hanks Darby’s *Formation of the Judgment and Calculation of Interest*, first delivered in 2004 at the University of Texas School of Law’s 14th Annual Conference on State and Federal Appeals. Also invaluable was Gregory J. Lensing, *Proportionate Responsibility and Contribution Before and After the Tort Reform of June 2003*, 35 TEX. TECH L. REV. 1125 (2004) (hereinafter *Lensing*).

2. The comparative negligence statute (originally TEX. REV. CIV. STAT. ART. 2212a and later the 1985-87 version of TEX. CIV. PRAC. & REM. CODE ch. 33) (“old art. 2212a”);
3. The common law contribution system established in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984);
4. The 1987-95 version of the comparative responsibility statute, TEX. CIV. PRAC. & REM. CODE ch. 33 (the “1987 Act”) which applies to actions accruing before September 1, 1995 (unless suit was filed after September 1, 1996, then the 1995 Act applies);
5. The 1995-2003 version of TEX. CIV. PRAC. & REM. CODE ch. 33 (the “1995 Act”), which applies to actions filed before July 1, 2003;
6. The 2003-2005 version of TEX. CIV. PRAC. & REM. CODE ch. 33 (the “2003 Act”), enacted as part of House Bill Four, which applies to actions filed on or after July 1, 2003; and
7. The current version of Chapter 33 which includes amendments enacted in 2005 (the “2005 Amendments”).

At common law and under chapter 32, the plaintiff’s contributory negligence barred recovery altogether. *See, e.g., Parrott v. Garcia*, 436 S.W.2d 897, 901 (Tex. 1969). Since 1973, however, one form or another of a comparative responsibility scheme has been in effect, whereby fault on the part of the plaintiff serves to reduce the recoverable damages rather than to bar recovery altogether.

This paper does not discuss the Chapter 32, *Duncan* and 1985-87 scheme except in passing, in part due to concerns about space (and our dear reader's attention span), but also because it is highly unlikely they will be applied to any case you have or may have in the future. However, when faced with a Chapter 33 issue in practice, counsel should be aware of these regimes when reviewing legal authorities, to be able to compare or distinguish authorities as necessary.

*****Fright Number One*****

Which version applies? The repeated (and enthusiastic) revisions of and amendments to Chapter 33 provisions over the years means that before taking any action you must identify the version under which your case arises. Which of these liability apportionment systems will apply to your case depends on the nature of the cause of action, the filing and trial dates of the case, and the accrual dates of the cause of action—some of which you may have under your control. As you will see *infra*, the version that applies to your case will (for example) decide whether and how you can join or designate responsible third parties, whether you can invoke proportionate responsibility in an intentional tort case, and whether you can take a dollar-for-dollar credit or a sliding-scale credit. In addition, when referring to common law authority, be sure that your statute has continuing relevance to your issue, and that it has not since been amended.

**II. COMPARATIVE RESPONSIBILITY:
REDUCING THE PLAINTIFF'S
RECOVERY.**

**A. Comparative Responsibility Under
the 1987 Act.**

Under the 1987 Act, a plaintiff is barred from a negligence-based recovery if his or her percentage of responsibility is greater than 50%. TEX. CIV. PRAC. & REM. CODE §§ 33.001(a), (c) (1987). A plaintiff is barred from a recovery for personal injury, property damage, or death based in strict tort liability, strict products liability, or UCC breach of warranty if his or her percentage of responsibility is 60% or greater. TEX. CIV. PRAC. & REM. CODE § 33.001(b) (1987). The

plaintiff's negligence could not be used to bar liability for intentional torts. *See, e.g., City of Garland v. White*, 368 S.W.2d 12, 17 (Tex. App.—Eastland 1963, writ ref'd n.r.e.); *see also Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 6 n.7 (Tex. 1991); *Burlington Northern R. Co. v. General Projection Systems, Inc.*, No. 05-97-00425-CV, 2000 WL 1100874, at *13 n.9 (Tex. App.—Dallas Aug. 8, 2000, pet. denied) (not designated for publication).

The trial court cannot add together the responsibility percentages for multiple plaintiffs to reach the 51% bar level. *See Sanchez v. Brownsville Sports Center, Inc.*, 51 S.W.3d 643, 656 (Tex. App.—Corpus Christi 2001, pet. granted, opinion vacated without regard to merits) (applying 1987 Act). The 1987 Act applies to Deceptive Trade Practice Act cases only to the extent they involve death or personal injury. TEX. BUS. & COM. CODE § 17.50(b)(1)(A), (B) (1989); TEX. CIV. PRAC. & REM. CODE § 33.002(b)(2) (1987).

Under the 1987 Act, where recovery is not barred altogether, the actual damages found by the trier of fact are reduced by the plaintiff's percentage of responsibility. TEX. CIV. PRAC. & REM. CODE § 33.012(a) (1987). The reduced damage award, after further reduction by settlement credits, if any, forms the maximum actual damage recovery by the plaintiff, but is *not* used (except as a maximum) in calculating a severally liable defendant's liability under § 33.013(a).

The plaintiff's percentage of responsibility does *not* reduce the exemplary damage award. *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 661 (Tex. App.—Dallas 2002, pet. denied); *I-Gotcha, Inc. v. McInnis*, 903 S.W.2d 829, 840 (Tex. App.—Fort Worth 1995, writ denied). This is because under all versions of chapter 33, § 33.002 renders the entirety of chapter 33 inapplicable to exemplary damage claims. *See* § 33.002(a) (1987); § 33.002(c)(2) (1995, 2003). However, § 33.002 will not save a punitive damage award when actual damages are barred under § 33.001. *Rosell*, 89 S.W.3d at 661 (“[S]ection 33.002 . . . does not change the settled rule that a plaintiff must show himself

entitled to actual damages before punitive damages are recoverable.”).

B. Comparative Responsibility Under the 1995 Act.

The 1995 Act left the comparative responsibility damage reduction scheme mostly unchanged, except that the dual 50% and 60% thresholds for barring a plaintiff’s recovery are replaced with a single threshold, under which recovery is barred if the plaintiff’s comparative responsibility exceeds 50%. TEX. CIV. PRAC. & REM. CODE § 33.001 (1995). Submission of a plaintiff’s comparative responsibility requires proof of proximate cause. *Dagley v. Thompson*, 2003 WL 22304562, at *2-3 (Tex. App.—Tyler Oct. 8, 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).

The 1995 Act (and presumably the 2003 Act) applies to products liability cases; however, if there is more than one defendant percentage fault should be submitted to the factfinder in terms of the named defendants, not by the product alleged to have caused the injury. See *AlliedSignal, Inc. v. Moran*, 2003 WL 22014805, at *3 (Tex. App.—Corpus Christi Aug. 27, 2003, no pet.).

The 1995 Act extended chapter 33 to intentional torts and all DTPA cases. TEX. CIV. PRAC. & REM. CODE § 33.002 (1995). It is clear that the intentional conduct of the plaintiff can be compared to the defendant’s intentional conduct; whether the plaintiff’s negligence can be raised as a bar to recovery for an intentional tort remains unsettled. On the other hand, certain statutory claims have been held exempted from Chapter 33. *Davis v. Estridge*, 85 S.W.3d 308, 311-12 (Tex. App.—Tyler 2001, pet. denied) (inapplicable to statutory fraud); *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 772-73 (Tex. App.—San Antonio 2002, no pet.) (inapplicable to UCC); *Southwest Bank v. Information Support Concepts, Inc.*, 85 S.W.3d 462, 468 (Tex. App.—Fort Worth 2002, *aff’d*

149 S.W.3d 104 (Tex. 2004) (same). At least 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”).

C. Comparative Responsibility Under the 2003 Act.

The 2003 Act did not change the comparative responsibility damage reduction scheme: recovery is still barred if the plaintiff’s comparative responsibility exceeds 50%. TEX. CIV. PRAC. & REM. CODE § 33.001 (2003). Chapter 33 still applies to all DTPA claims, TEX. CIV. PRAC. & REM. CODE § 33.001(a)(2) (2003), and nothing in the 2003 Act suggests that the legislature intended to alter the application of Chapter 33 in light of the cases cited *supra* regarding the UCC and statutory fraud.

Fright Number Two

Chapter 33: procedural or substantive? In a case last year, a federal district court applied the responsible third party designation practice of Chapter 33.004 as substantive, and not as merely procedural. See *Bueno v. Cott Beverages, Inc.*, No. Civ.A. SA04CA24XR, 2005 WL 647026 (W.D. Tex. Feb. 8, 2005). The district court rejected the plaintiff’s argument that third party practice is exclusively governed by the Federal Rules of Civil Procedure 14.

In *Guerra v. Microsoft Corporation*, Judge Sanders side-stepped the issue of whether Chapter 33’s responsible third party procedures were substantive or procedural, 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). The district court used Rule 14 to determine whether to add third party defendants to the case. Finding supplemental jurisdiction, the Court allowed the joinder.

In *Marella v. Autozone*, Judge Sanders interpreted a pre-2003 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 (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 Section 33.004 of Chapter 33 is “procedural in nature,” such that Rule 14 takes precedence. *Id.*; see also *Bolden v. Apache Corp.*, No. Civ.A. G-04-345, 2005 WL 1653057 (S.D. Tex. July 9, 2004) (indicating without holding, that Ch. 33 “responsible third party” practice is substantive).

D. Comparative Responsibility in “Tort-Like” Cases.

It is fairly clear that Chapter 33 does not apply to contract cases. For example, the Austin court of appeals recently refused to apply Chapter 33’s scheme for settlement credits to breach of contract claims. *CTTI Priesmeyer, Inc. v. Kayo Ltd. Partnership*, 164 S.W.3d 675 (Tex. App.—Austin 2005, no pet.). In *CTTI Priesmeyer*, the owner of an office and warehouse sued its general contractor, among others, for breach of the construction and repair contracts when the concrete foundation developed cracks. *Id.* at 679-680. The supreme court held that tortfeasors might be jointly and severally liable for contract damages, but other contract defendants are only jointly and several when they promise the same performance. *Id.* at 685. The defendant argued that it was entitled to settlement credit under the “one satisfaction rule.”

The court of appeals held that the defendant was not entitled to settlement credits because a breach of contract claim does not give rise to comparative causation. *Id.* at 683-684; see also *Doncaster v. Hernaiz*, 161 S.W.3d 594 (Tex. App.—San Antonio 2005, no pet.) (appellate court held that in a suit against a bank to recover note balances, Chapter 33’s apportionment of responsibility scheme did not apply to a cause of action based in contract); *In re Kyocera Wireless Corp.*, 162 S.W.3d 758 (Tex. App.—El Paso

2005, no pet.) (since the plaintiff only asserted a contract claim against the defendant, the appellate court held that the proportionate responsibility scheme found in Chapter 33 § 33.013 was inapplicable).

Other cases have questioned whether Chapter 33 applies based on the argument that the plaintiff’s claims were tort-like. In *Medical Select Management*, tortious interference claims were brought by an HMO against various banks; the suit arose from an HMO officer’s unauthorized withdrawal from several accounts. *In re Medical Select Management*, 2004 Bankr. LEXIS 48 (U.S. Bankruptcy Court for the Northern District of Texas, Fort Worth Division 2004). Acting as a fact finder, the bankruptcy court held against the managed care entity, in accordance with Section 33.001 of the Texas Civil Practices and Remedies Code:

Under that statute [HMO] cannot recover damages if its percentage of responsibility for the injuries it claimed is greater than 50 percent. On this record [HMO] must bear more than 50 percent of the responsibility for the injuries it claims. While none of the parties should be particularly proud of their institutional conduct here, [HMO] could have protected itself by three simple, common sense acts. . . . On this record, PacifiCare clearly bears more than 50 percent of the responsibility for the injuries it claims. As a result PacifiCare is precluded from recovery from [Bank] in accordance with Section 33.001 of the Texas Civil Practices and Remedies Code.

See also *In re Enron Corp. Securities, Derivative & “ERISA” Litigation*, 314 B.R. 354 (S.D. Tex. 2004) (district court held that there could be no contribution for punitive damages).

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.*

Doncaster v. Hernaiz involved a suit by a creditor against a bank representative for amounts due on loans the representative had solicited for a third party. *Doncaster v. Hernaiz*, 161 S.W.3d 594 (Tex. App.—San Antonio 2005, no pet.). The San Antonio Court of Appeals held that because the underlying suit was in contract, not in tort, the doctrine of proportionate responsibility was inapplicable. *Id.* at 604.

Another recent case, *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. *Id.*

*****Fright Number Three*****

How does Chapter 33 play out in fraud and fraudulent inducement cases? It is now generally accepted that Chapter 33 requires the apportionment of responsibility among tortfeasors in a fraud case. But 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—for a further discussion see *infra* at Part VII(E).

E. Order of Submission: How and When to Submit Negligence and Proportionate Responsibility.

An important case to watch in the Texas Supreme Court is from Dallas County in the Fifth District court of appeals. *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas 2004, pet. granted). The principle issues in this wrongful death case are (1) whether separate submission of “contributory negligence” after the jury found negligence and gross negligence and awarded damages, was reversible error, (2) whether the Court of Appeals applied the proper standard for legal sufficiency of gross negligence, and (3) whether the amended pre and post-judgment interest statute, applicable to cases “subject to appeal” on September 1, 2003, applies to a case pending on appeal at the effective date of September 1, 2003. *Id.* In *Hogue*, the deceased family sued for Columbia's alleged failure to see that emergency patients were given prompt and proper treatment. *Id.* at 677. Hogue had been diagnosed with a heart murmur in 1996, but never pursued further treatment; Hogue did not tell the hospital's emergency room doctor of this heart problem when admitted for fluid on his lungs. *Id.* Hogue died of a heart valve leak after spending more than ten (10) hours at the hospital waiting to see a heart and lung specialist and waiting for an emergency electrocardiogram ordered by the lung specialist. *Id.* The hospital failed to have an on call list for specialists and had not arranged for emergency service by an electrocardiogram provider. *Id.*

At trial, the court submitted a jury instruction on contributory negligence *after* the jury returned a verdict for actual and exemplary damages against the hospital. *Hogue*, 132 S.W.3d at 679. The jury answered “no” on the contributory negligence issue. *Id.* The court of appeals affirmed but reversed on actual damages by applying the statutory “caps.” *Id.* at 681. The

supreme court heard oral arguments last Spring, but has not yet issued an opinion in the case.

Another case worth noting recently held that it was error to jointly submit the plaintiff's negligence *and* his percentage of responsibility. The case resulted from the death of Thomas McCullough after he contracted yellow fever when traveling overseas. *McCullough v. Western Geco, LLP*, No. 13-04-366-CV, 2005 WL 3312982 (Tex. App.—Corpus Christi Dec. 8, 2005, pet. filed). His widow sued the safari company, alleging “negligent undertaking” and negligent misrepresentation. *Id.* at *1. The jury apportioned 70% of liability to Thomas McCullough, and the trial court entered a take-nothing judgment. *Id.* But there was no liability issue submitted on Thomas. *Id.* Instead, the proportionate responsibility question read: “What percentage of the negligence that proximately caused the death of Thomas McCullough do you find to be attributable to each of those listed below that you find to have been negligent?” *Id.* at *2.

The appellate court reversed, stating that: “[i]n combining the question of Thomas’s negligence with the question of proportionate responsibility, the trial court failed to achieve its goal of ‘submitting to the jury issues for decision logically, simply, clearly, fairly, correctly, and completely.’” *Id.* (Citations omitted). The court stated that it had “no doubt” that the error probably caused the rendition of an improper judgment, especially since in the jury’s liability finding, it answered in the affirmative that Thomas “reasonably relied” on false information supplied by the defendants, a finding somewhat inconsistent with finding Thomas 70% responsible. *Id.*

F. Waiving Charge Error When Submitting Percentage Fault.

The El Paso court of appeals recently reaffirmed the rule that one can waive charge error concerning proportionate responsibility under Chapter 33. *Sears Roebuck & Co. v. Abell*, 157 S.W.3d 886, 893 (Tex. App.—El Paso 2005, pet. denied). In *Sears Roebuck*, plaintiffs purchased a heating unit from Sears that later caught fire, damaging the plaintiffs’ home. *Id.* Plaintiffs

sued Sears and several sub-contractors involved in the installation. *Id.* After plaintiffs elected recovery from Sears, Sears complained of charge error in failing to submit proportionate responsibility. *Id.* The court of appeals held that while Sears properly submitted the question about which it complained in substantially correct form, it did not object to its lack of inclusion in the charge nor obtain a ruling. *Id.*

III. RESPONSIBLE THIRD PARTIES: TO JOIN OR TO DESIGNATE?

Responsible third parties (“RTPs”) is one of the areas that requires the most attention in Chapter 33 practice: depending on the version your case falls under, you may need to formally join the RTP, or you may need only to designate. Although RTP practice will not create a right of recovery (*see* Contribution, *infra* at Part IV for substantive rights of recovery against joint tortfeasors), it will create the opportunity to reduce one defendant’s share of responsibility—hopefully below the magic 50% joint-and-several benchmark.

A. RTP Practice Under the 1995 Act.

RTP practice prior to the 2003 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).

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 also join a RTP even if limitations has expired.

*****Fright Number Four*****

Look for (and beware of) the limitations loophole. 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.

But consider the following scenario: (1) plaintiff sues defendant before limitations expire but does not properly effect service; (2) the defendant gets out of the case on summary judgment based on the statute of limitations; (3) a second defendant then designates the first defendant as a “responsible third party,” and plaintiff alleges the statute of limitations is “revived” under Chapter 33.004(e). What result? What if defendant obtains a severance simultaneously to obtaining summary judgment on limitations? Under pre-Chapter 33 versions, the language only allows adding if not sued by plaintiff; this language is not in the current version of Chapter 33.

B. RTP Practice Under the 2003 Act.

The changes to RTP practice under House Bill Four were some of the most significant in Chapter 33 practice. Instead of formally joining responsible third parties, a named defendant may now submit blanks for RTPs without formal joinder: 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 statute of limitations is no longer relevant to the timing of the named defendant's motion to designate the RTP—but the plaintiff still enjoys the opportunity to join the RTP as a defendant despite the expiration of limitations as long as the plaintiff joins the RTP as a defendant within 60 days of the designation. TEX. CIV. PRAC. & REM. CODE § 33.004(e) (2003).

RTPs are now defined broadly as any person who is alleged to have caused or “contributed to causing in any way” the harm the plaintiff complains of. TEX. CIV. PRAC. & REM. CODE § 33.011(6) (2003). Under this expanded definition, bankrupt defendants can be designated as RTPs as well as employers who enjoy immunity from worker's compensation statutes. Significantly, this new version deletes the 1994 Act requirement that the RTP be “capable of being sued” and subject to the court's jurisdiction. In addition, an RTP can be designated whether the person is known or unknown.

Even though the designation rules are more liberal, the plaintiff 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). The plaintiff can also move to strike the RTP designation if, after adequate discovery, there is no evidence that the RTP is responsible for any part of the plaintiff's damages. TEX. CIV. PRAC. & REM. CODE § 33.004(l) (2003).

*****Fright Number Five*****

What does “contributing to causing in anyway” mean anyway? This new expanded definition of RTP begs the question of what causation evidence is required. As discussed *infra*, a defendant must show evidence of causation to submit an RTP. But the “in any way” language does not track – and indeed appears broader than – the proximate cause standard.

C. Still Must Plead and Prove Culpability to Achieve Third Party Submission.

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). In *Whitney National Bank*, the bank brought an action against three of its customers whom it

believed had engaged in illegal lending activity (*i.e.*, bank fraud). *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004). The alleged bad actors contended that an employee violated the bank's loan policy manual and, therefore, was a "responsible third party" under Chapter 33. *Id.* at 683. The federal district court held that to the extent Chapter 33 provides a basis for reducing damages, it applies only to acts that are negligent or violate an applicable legal standard. *Id.* at 683-84.

In *Lyman D. Robinson Family Ltd. P'ship*, the appellants had deposited earnest money with J. Baker Acquisition Company pursuant to a land sale contract. *Lyman D. Robinson Family Ltd. P'ship v. McWilliams & Thompson, PPLC*, 143 S.W.3d 518 (Tex. App.—Dallas 2004, pet. denied). When appellants refused to repay J. Baker for overpayment, J. Baker filed suit seeking repayment and attorney's fees. *Id.* at 520. The trial court ultimately granted J. Baker's motion for summary judgment and held each appellant liable for the full amount of the judgment. *Id.* at 521. The appellants argued that there was no basis for the trial court to place the burden of its judgment on all of the appellants jointly. *Id.* In their original answer, appellants asserted that they had properly plead facts to trigger Chapter 33's proportionate responsibility provisions:

Pursuant to Rule 94 of the Texas Rules of Civil Procedure, Defendants set forth the affirmative defense of proportionate responsibility.

The Court of Appeals concluded:

Even assuming appellants intended by their assertion of 'proportionate responsibility' that each appellant should only be required to repay his or her own pro rata share of the overpayment, appellants did not make that specific argument in their pleadings and presented no further complaint regarding what they termed 'proportionate responsibility.' We conclude a single sentence in appellants' original answer referring to Rule 94 was insufficient to make the

trial court aware of their assertion that each of them should not be adjudged liable for the entire amount of the overpayment. Accordingly, appellants have failed to preserve this issue for our review. *Id.* at 521-22.

Insurance One Agency involved a failed attempt to add a previous insured as a third party defendant under Chapter 33. *United States v. Insurance One Agency, L.C.*, No. Civ. 3:04-CV-1675-H, 2004 WL 2250273 (N.D. Tex. Sept. 23, 2004). District Court Judge Barefoot Sanders held that Chapter 33 was limited in application to actions sounding in tort or in the Texas Deceptive Trade Practices-Consumer Protection Act. *Id.* at *1. Noting that the defendant had not alleged any DTPA claim and failed to allege a tort or other action making the purported third party defendant a "tortfeasor," the district court held that the addition of a responsible third party under Chapter 33 of the Code was not allowed. *Id.*

*****Fright Number Six*****

Don't forget proximate cause! Just because 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: there must also be evidence to support the submission to the jury. If the plaintiff does not want to submit a blank for the RTP's share of fault, the named defendant must be certain to 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.

Defendants should also beware of being lulled into complacency when the plaintiff appears to have identified all of the potential RTPs in its complaint. Should the plaintiff not develop evidence against those defendants and then nonsuit on the eve of trial (even less than sixty days after the deadline for designating RTPs), the remaining named defendants may find themselves with a looming trial date and RTPs against whom no evidence has been gathered that would support submission to the jury. Defendants should protect themselves against this scenario in discovery 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.

D. Mandamus and Responsible Third Party Practice.

In a Chapter 33 mandamus opinion, the First Court of Appeals denied mandamus relief for the trial court's refusal to designate responsible third parties. *In re Unitec Elevator Services Co.*, 178 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2005, original proceeding). In *Unitec*, the defendants sought to have three different responsible third parties designated under Texas Civil Practice and Remedies Code Section 33.004, and the trial court denied each motion. *Id.* at 55. Defendants consequently sought mandamus relief. The court of appeals held that there was no clear abuse of discretion as to the first motions, but the trial court abused its discretion as to the third motion to designate responsible third party. *Id.* at 57.

Even though the court of appeals recognized that Defendants had the right to have the responsibility of all tortfeasors adjudicated by the same jury, and the court acknowledged the fact that this error alone would probably entitle the defendant to a new trial, the appellate court found that there was an adequate remedy by appeal, especially given the possibility Defendants might prevail at trial. *Id.* at 64. The appellate court also held there was no clear abuse of discretion when one of the defendants unsuccessfully sought leave to designate a previously non-suited co-defendant. *Id.* Plaintiffs argued that Defendants should have designated the responsible third party before that party was non-suited because they should have known that that party could be non-suited at any time. *Id.* at 59. Without agreeing or disagreeing, the court of appeals found no clear abuse of discretion in refusing to allow the designation after non-suit. *Id.*

The main complaint was that the trial court abused its discretion because it deprived Defendants of a proper submission under §33.004. *Unitec*, 178 S.W.3d at 59 (Section 33.003 requires a court to determine the

percentage responsibility for each claimant, each defendant, each selling person and *each responsible third party* who has been designated under §33.004). A responsible third party is now defined to mean “any person who has alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defect or unreasonable dangerous product, both conduct or activity that violates applicable legal standard, or by any combination of these.” TEX. CIV. PRAC. & REM. CODE § 33.011(6).

The appellate court found that there was adequate remedy by appeal in part because they had the right to join Southwestern Bell as a contribution defendant. *Id.* at 65. The First Circuit declined to follow *Arthur Anderson* and instead followed the appellate opinion in *Martin*. *Id.*; see *In re Arthur Anderson, LLP* 121 S.W.3d 471 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (holding that a trial court abused its discretion in denying a motion to join multiple financial institutions as responsible third parties); *In re Martin*, 147 S.W.3d 453 (Tex. App.—Beaumont 2004, pet. denied). The *Unitec* court also relied on *In re Prudential*, where the Texas Supreme Court held that “an appellate remedy is not inadequate merely because it may involve more expense or delay in obtaining relief.” *Id.*; *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004); see also *In re Oxbow Carbon & Mineral, L.L.C.*, No. 14-05-00451-CV, 2005 WL 1242209 (Tex. App.—Houston [14th Dist.] May 26, 2005, no pet.) (appellate court declined mandamus to overrule the trial court's order denying motion for leave to designate a deceased worker's employer as a responsible third party in an underlying wrongful death action).

IV. SETTLEMENT CREDITS.

A. Settlement Credits Under the 1987 Act and the 1995 Act.

A convoluted statutory scheme governs settlement credits under the 1987 Act and the 1995 Act. These older schemes allow for a dollar-for-dollar credit *or* a “sliding scale” credit, according to the defendant's election.

TEX. CIV. PRAC. & REM. CODE § 33.012(b) (1987, 1995).

The 1987 Act and the 1995 Act do not define “settlement,” but do define “settling person” as one who at the time of submission has paid or promised to pay money or anything of monetary value to a plaintiff in consideration of potential liability. TEX. CIV. PRAC. & REM. CODE § 33.011(5) (1987, 1995). Under this definition, a settlement reached after charge objections, the reading of the charge, and closing arguments is too late. *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 391 (Tex. 2000).

A settlement need not discharge the settling person’s liability in its entirety. Thus, a “high-low” agreement constitutes a settlement and generates a settlement credit equal to the minimum amount paid or promised to be paid by the settling defendant. *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 319-20 (Tex. 1994); *Lewis v. Exxon Co., U.S.A.*, 786 S.W.2d 724, 729-30 (Tex. App. — El Paso 1989, writ denied).

A settlement credit is available even where the settling person is ultimately found to have no responsibility for the injury. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 832 (5th Cir. 1992) (applying Texas law). Nor must the settling person remain or be made a party to the suit. *Wynn v. Cohan*, 864 S.W.2d 205, 207 (Tex. App.—Houston [14th Dist.] 1993, writ denied). On the other hand, arbitration is not a settlement—a defendant paying an arbitration award is a liable defendant, not a settling person. *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 832-33 (Tex. App.—Austin 2002, no pet.).

Settlement credits may also be affected by the nature of the defendant’s liability. A defendant cannot receive credit for settlement amounts representing punitive damages under any version of Chapter 33. TEX. CIV. PRAC. & REM. CODE § 33.002(c)(2) (1987, 1995, 2003). The settling plaintiff must prove the settlement’s allocation to punitive damages if the settlement agreement does not specify the allocation. *Ellender*, 968 S.W.2d at 927-28.

With regard to the timing of the settlement credit, the Texas Supreme Court recently held that a trial court is not required to reduce a damage award by the dollar-for-dollar settlement amount *before* determining the non-settling defendant’s proportionate liability. *Roberts v. Williamson*, 111 S.W.3d 113, 123 (Tex. 2003). The court notes that § 33.012 controls the claimant’s total recovery, while § 33.013 controls the *defendant’s* separate liability. *Id.* Because they are separate inquiries, the trial court should first reduce the award by the remaining defendant’s percentage liability—if the calculated amount is recoverable under § 33.012 (*i.e.*, the reduced amount already covers the full amount of settlement credits) then no further credit is necessary. *Id.*

*****Fright Number Seven*****

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’s 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.

B. 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.

Fright Number Eight

So you think you’re a settling person?
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.*

C. 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.

Fright Number Nine

How are settlement credits applied when there are multiple plaintiffs seeking damages arising from 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, pet. granted), *reversed 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 §32.012(b)(1) requires 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 §32.001(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, the recent case of *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 Sept. 15, 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.*

V. JOINT AND SEVERAL LIABILITY.

A. Joint and Several Liability Under the 1987 Act.

The 1987 Act replaced common-law joint and several liability with a new rule that a defendant would only be liable for the amount of damages equal to his percentage of fault as determined by the jury. TEX. CIV. PRAC. & REM. CODE § 33.013(a) (1987); *see also C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 321 (Tex. 1994).

In addition to a defendant's several liability under § 33.013(a), the defendant is jointly and severally liable for the plaintiff's recoverable damages if both of the following are true: (1) the defendant's percentage of responsibility is greater than 20%; and (2) (for negligence actions only) the defendant's percentage of responsibility is greater than the plaintiff's. TEX. CIV. PRAC. & REM. CODE § 33.013(b) (1987). The defendant is also jointly and severally liable if any of the following are true: (1) the plaintiff is not assigned a percentage of responsibility *and* the defendant's percentage of responsibility is greater than 10%; (2) the case relates to the deposit, discharge, or release into the environment of any hazardous or harmful substance; or (3) the case is a "toxic tort" case. TEX. CIV. PRAC. & REM. CODE § 33.013(c) (1987).

Notwithstanding the formulation that joint and several liability is "in addition to" each defendant's several liability, the "one satisfaction" rule continues to apply, and the most the plaintiff can recover from all defendants combined is the amount of recoverable damages as determined under § 33.012. *C & H Nationwide, Inc.*, 903 S.W.2d at 321. Thus, when the § 33.013(a) calculation results in an amount greater than the plaintiff's total recoverable damages under § 33.012, the latter amount governs. *See also Roberts*, 111 S.W.3d at 123.

When a dollar-for-dollar settlement credit has been elected, the credit is used to calculate the plaintiff's recoverable damages. A jointly-and-severally liable defendant is liable for the full amount of the plaintiff's recoverable damages; the settlement credit is *not* deducted from the amount for which the defendant is jointly and severally liable. *See Sugar Land Properties, Inc. v. Becnel*, 26 S.W.3d 113, 119-21 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *see also Roberts*, 111 S.W.3d at 123.

B. Joint and Several Liability Under the 1995 Act.

The 1995 Act retains the general rule of several liability. TEX. CIV. PRAC. & REM. CODE § 33.013(a) (1987). For defendants who are

jointly and severally liable, the 1995 Act modifies the exceptional conditions under which joint and several liability will apply. The defendant is jointly and severally liable if the defendant's percentage of responsibility is greater than 50% **OR** the defendant's percentage of responsibility is equal to or greater than 15% **AND** the case relates to the deposit, discharge, or release into the environment of any hazardous or harmful substance *or* the case is a "toxic tort" case. TEX. CIV. PRAC. & REM. CODE §§ 33.013(b) & (c) (1995).

Just as the court can not combine the percentage fault of different plaintiffs to reach the statutory bar, the court will not combine the percentages of each defendant to create joint and several liability. *See Sanchez*, 51 S.W.3d at 656; *see also AlliedSignal, Inc.*, 2003 WL 22014805, at *6; *Emmons*, 50 S.W.3d at 116 (no joint and several liability where no defendant's percentage was more than 50%). If all defendants are not properly submitted to the jury to apportion liability, then joint and several liability cannot be determined and the case may be remanded for further findings. *AlliedSignal, Inc.*, 2003 WL 22014805, at *6-7.

C. Joint and Several Liability Under the 2003 Act.

The 2003 Act again revised the joint and several responsibility provision. TEX. CIV. PRAC. & REM. CODE § 33.013 (2003). Under the new scheme, almost all defendants are jointly and severally liable *only* if their percentage of responsibility is found to be greater than 50 percent. TEX. CIV. PRAC. & REM. CODE § 33.013(a) (2003). Section 33.013 eliminates the toxic tort exception above; thus all defendants are treated equally. Now, the only exception to this rule comes into play if a defendant engages in conduct described in one of thirteen Penal Code provisions with a specific intent to do harm to others. TEX. CIV. PRAC. & REM. CODE § 33.013(b), (e) (2003). (This penal code provision was previously enacted at TEX. CIV. PRAC. & REM. CODE § 33.002(b) (1995)).

One issue currently percolating through the courts is whether the percentage responsibility of a derivatively liable defendant (*i.e.* an

employer who negligently supervises an employee who causes injury to another or dram shop cases) should be apportioned against a directly liable defendant. The Texas Supreme Court recently held in *F.F.P. Operating Partners, L.P. v. Dueñez*, No. 02-1381, 2004 WL 1966008 (Tex. Sept. 3, 2004) that Chapter 33 proportionate responsibility applies to statutory dram shop cases, requiring submission of the percentage responsibility of *both* the driver and purveyor of alcohol in dram shop cases—even though the jury is required to find proximate cause only as to the driver. *Id.* at 10.² Whether this analysis will apply to a defendant derivatively liable under common law torts remains unclear.

Fright Number Ten

Abolition of joint and several liability? Some states have recently amended their own versions of Chapter 33 to abolish joint and several liability altogether. *See, e.g.*, Florida House Bill 145, amending Fla. Stat. § 768.81, effective April 26, 2006. There is no indication, however, that any such initiatives have been taken in the Texas legislature.

VI. CONTRIBUTION.

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.*

² The Court ultimately affirmed on the ground that there was no harm in *F.F.P. Operating Partners* because the purveyor was ultimately responsible for *both* his own and the driver's negligence under the special provisions of the Dram Shop statute. Thus, any apportionment of liability between the driver and purveyor could be determined in the severed contribution action. Justice Owen's dissent disagrees on this basis, arguing that Chapter 33 allows the purveyor to reduce his liability by the driver's share of responsibility notwithstanding the Dram Shop statute.

Pierce Homes, Inc., 86 S.W.3d 827, 831 (Tex. App.—Austin 2002, no. pet.).

****Fright Number Eleven****

Not all joint tortfeasors are vulnerable to contribution claims—which may leave some defendants holding the bag. 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)

A. Four Contribution Schemes.

1. 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 applies to tort actions, but by its express terms it does not apply if a right of contribution, indemnity or recovery between defendants is elsewhere provided by common law or statute. TEX. CIV. PRAC. & REM. CODE § 32.001. In 1995, the Texas legislature expanded the scope of Chapter 33 to the point where Chapter 32 is generally considered to be superfluous; there are no recent cases applying Chapter 32.

****Fright Number Twelve****

What is the timeline for asserting contribution rights against codefendants? 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); *Nowasco 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.).

2. 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.

B. 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.

Fright Number Thirteen

What is the timeline for asserting contribution rights against nonparties? 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.

VII. RECENT CHAPTER 33 DEVELOPMENTS.

A. Summary of Major Supreme Court Developments.

In the last two years, Chapter 33 was the focal point of four Texas Supreme Court cases focusing on the pre-July 1, 2003 version of Chapter 33. The most important were *Duenez* and *Romero v. KPH Consol., Inc.* (hereinafter *Romero*). See *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212 (Tex. 2005). *Duenez* was decided by a five to four majority. *Duenez*, however, was not without controversy in the supreme court: rehearing was granted last year (but has not yet been decided), after three Justices who had been in the five-justice majority left the supreme court. See Mary Alice Robbins, *Rehearing Granted in Dram Shop Case*, TEXAS LAWYER, April 18, 2005, Vol. 21, No. 7, at 1. Since it is unknown exactly how these Justices' replacements voted on rehearing, the final outcome in *Duenez* is still very much in doubt.

One thing is certain about *Duenez*: it will dramatically influence how both the pre- and post-July 1, 2003 versions of Chapter 33 are interpreted, especially in any case involving issues of derivative or vicarious liability. Last year the supreme court created further doubt that Texas is still a "broad form submission" state with its decision in *Romero*. *Romero* dealt with the interplay between Chapter 33 and a broad form jury charge submitting a single percentage apportionment question, when one of two theories of liability was found to lack evidentiary support.

In *Battaglia v. Alexander* (hereinafter *Battaglia*), the supreme court decided the Chapter 33 question of when dollar settlement credits are to be applied to past damages—before or after calculation of prejudgment interest. *Battaglia*, 177 S.W.3d 893 (Tex. 2005). In *Southwest Bank v. Information Support Concepts, Inc.* (hereinafter *Southwest Bank*), the supreme court held that Chapter 33 apportionment is not appropriate in a suit under the Uniform

Commercial Code for conversion of an instrument. *Southwest Bank*, 149 S.W.3d 104 (Tex. 2004).

Even though House Bill 4's amendments to Chapter 33 only became effective in July 2003, cases involving the 2003 amendments have worked their way through the courts of appeals; several of these address the availability of *mandamus* when a trial court does not permit pleading of "responsible third party." These cases will also be discussed *infra*.

B. *Duenez*: Proportionate Responsibility, the Dram Shop Act, and Derivative Liability.³

1. Legal Issue in *Duenez*.

The precise legal issue confronted in *Duenez* 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* 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").

2. Facts of *Duenez*—Supreme Court Opinion.

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

³ In light of the significance of *F.F.P. Operating Partners, L.P. v. Duenez* (hereinafter *Duenez*), the authors also found very useful 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). See *Duenez*, No. 02-0381, 2004 WL 1966008 (Tex. Sept. 3, 2004), *reh'g granted in part*.

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*, 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*, 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.*

3. Additional Facts.

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* (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.*

4. 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*, 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.*

5. Supreme Court’s Majority Opinion—*Duenez*.

Duenez 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*, 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*, 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* (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* (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* 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* 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*, 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

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.

language of the statute the dram shop would ultimately be liable for both its own share and the share of responsibility of the intoxicated patron. 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* 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*, 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*; the drunk driver was in prison and likely insolvent. This way, the majority viewed it as giving effect to both the Dram Shop Act and Chapter 33.⁵

6. The Dissent: A Plain Text Reading?

Justice Owen authored the dissent, 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*, 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). Under the dissent, the percentage of fault assessed against the insolvent drunk patron

⁵ This confusion over whether "fault" "responsibility" or "causation" is what is being submitted to the jury for percentage findings continues to haunt Texas joint and several liability jurisprudence. See e.g. *Romero*, *infra*. See also *Lensing* at 1134.

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; 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. *See* discussion of *Southwest Bank* (holding that Chapter 33 does not apply to a UCC claim), *infra* part V.

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, 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."⁶

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 establishments. *Duenez*, 2004 WL 1966008, at *13. A jury found the patron 75% responsible, the first bar 5% responsible, and the second and third bars 10% responsible each. *Id.* It 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.* But is it the Legislature's intent under the Dram Shop Act?

⁶ *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.

7. Three In the Majority Depart and Rehearing Is Granted.

After the supreme court decided *Duenez* in September 2004, there was significant turnover, 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 that rehearing in *Duenez*. Only eight justices participated in the vote on rehearing. The only remaining Justices from the original majority are Justices O’Neill and Jefferson. The rehearing in *Duenez* was September 27, 2005. And of course, the author of the dissent, Justice Owen, is now on the Fifth Circuit Court of Appeals.

8. Additional Thoughts About *Duenez*.

The Dram Shop Act was first passed in 1987. The 1995 version of Chapter 33 was the proportionate responsibility statute at issue in *Duenez*, and the Dram Shop Act saw the first comprehensive attempt at comparative fault by the Legislature. Underwood and Morrison have extensively analyzed the legislative history of the pre- and post-1995 versions of 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 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

⁷ A strict plain textualist would never resort to legislative history—*see* Scalia, *A Matter of Interpretation*. But given the struggle by both the majority 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.

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.

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).

9. The Pattern Jury Charge and Other Derivative Liability Cases.

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 entruster 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/entruster 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 entruster liable for the percentage of fault apportioned to the driver.

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).

The Dallas Court of Appeals appears to have 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 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.*

Soon after *Duenez*, the Fort Worth Court of Appeals confronted the issue of omission of an allegedly negligent entruster from the jury charge. As discussed in part C, 6, *infra*, the Court of Appeals followed *Duenez*, but to the disadvantage of the party seeking recovery, it did not treat the jury’s deliberations the way the

Supreme Court did in *Romero*, decided the next day.

10. Post-Duenez Developments.

In one of the more interesting post-Duenez 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. filed). 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*. *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*] 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* 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 abetter, was derivatively and vicariously responsible for the Pate entities’ conduct. *Id.* at *4. Relying on *Duenez 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.

11. Other States’ Cases On Submission of Proportionate Responsibility in Derivative Liability Cases.

Several jurisdictions require separate submission: *Marceaux v. Gibbs*, 699 So.2d 1065, 1070-71 (La. 1997) (holding in a negligent supervision case that apportionment must include both tortfeasors); *McKillip v. Smitty’s Super Valu, Inc.*, 945 P.2d 372, 375 (Ariz. Ct. App. 1997, review denied) (“Arizona courts have repeatedly rejected” the argument that responsibility should not be apportioned to a person whose negligence the defendant should have anticipated and taken precautions against); *McCart v. Muir*, 641 P.2d 384, 389-90 (Kan. 1982) (holding in a negligent entrustment case that responsibility should be apportioned between the entrustor and trustee, and rejecting the argument that the entrustor is vicariously liable for harm caused by the trustee) (Note: the Texarkana Court of Appeals declined to follow this case in *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d

431, 432 n.7 (Tex. App.—Texarkana 1992, no writ) (“We are aware of, and decline to follow, cases from other jurisdictions in which fault was apportioned to the entrustor.”)); *Steele v. Kerrigan*, 689 A.2d 685, 690-91 (N.J. 1997) (dram shop case holding that provider of alcohol was entitled to reduce its liability by the comparative share assigned to the drunk minor, who assaulted plaintiff); *Stewart v. Ryan*, 520 N.W.2d 39, 45 (N.D. 1994) (permitting apportionment between dramshop and intoxicated patron who shot police officer intentionally because the state’s comparative-fault act “clearly replaced the concept of joint and several liability with several allocation of damages among tortfeasors in proportion to the fault of those who contributed to the injury”); *Weiss v. Hodge*, 567 N.W.2d 468, 474 (Mich. Ct. App. 1997) (dramshop not vicariously responsible for actions of intoxicated patron and therefore was entitled to compare its responsibility with the intoxicated tortfeasor); *Schrader v. Carney*, 586 N.Y.S.2d 687, 695 (App. Div. 1992) (remanding for trial to apportion responsibility among parties, including impaired driver and person who provided alcohol to driver).

12. Other Issues of Vicarious and Imputed Liability

Negligent supervision occurs when the employer knows, or by the exercise of reasonable care should know, that an employee is incompetent, unfit, or otherwise dangerous, and the employer fails to take reasonable measures to prevent injury to others. *Houser v. Smith*, 968 S.W.2d 542, 546 (Tex. App.—Austin 1998, no pet.). The only apparent difference between a direct negligence claim and a claim for negligent supervision is that in cases based on theories such as negligent supervision, the person who was negligently supervised must have been negligent and a proximate cause of the injury.⁸

⁸ *See St. Paul Med. Ctr. v. Cecil*, 842 S.W.2d 808, 813-14 (Tex. App.—Dallas 1992, no writ); *Park N. Gen. Hosp. v. Hickman*, 703 S.W.2d 262, 265-66 (Tex. App.—San Antonio 1985, writ ref’d n.r.e.); *Clark v. Harris Hosp.*, 543 S.W.2d 743, 745 (Tex.

Otherwise, the normal elements of negligence appear to apply. *See generally* *Lensing, supra*.

Frequently at issue in negligent supervision cases is the issue of foreseeability as a predicate for duty. *See, e.g., Capece v. Navisite, Inc.*, NO. 03-02-00113-CV, 2002 WL 31769032, at *6 (Tex. App.—Austin, Dec 12, 2002, no pet.) (not designated for publication) (“Texas courts hold an employer directly liable only when the employer places its employee in a situation that *foreseeably* creates a peculiar risk of harm to others because of the employee’s particular duties.”).⁹ An employer has no duty to protect third parties from harm by the employee unless such harm is foreseeable. *Id.* (noting that foreseeability is a factor in both duty and proximate cause inquiries). In addition, some authorities have declined to expand the duty to include situations in which the employer either had no knowledge of the employee’s condition or tendencies or did not affirmatively exercise control over the employee.¹⁰ *Moore v. Times*

Herald Printing Co., 762 S.W.2d 933, 934-35 (Tex. App.—Dallas 1988, no writ). Otherwise, “[a]s a general rule, one person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control.” *Otis Eng’g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983) (citing the RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

With regard to duty, the Texas Supreme Court has held that an employer has a duty to third parties when “because of an employee’s incapacity, an employer exercises control over the employee, the employer has a duty to take such action as a reasonably prudent employer under the same or similar circumstances would take to prevent the employee from causing an unreasonable risk of harm to others.” *Otis Eng’g Corp.*, 668 S.W.2d at 311. The Dallas Court of Appeals considered this holding and held it did not apply when the employer had no knowledge of the employer’s incapacity and did not affirmatively control the employee. *Moore*, 762 S.W.2d at 934-35.

Civ. App.—Fort Worth 1976, no writ); *cf. Portlock v. Perry*, 852 S.W.2d 578, 583 (Tex. App.—Dallas 1993, writ denied); *but see Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 655 (Tex. App.—Dallas 2002, pet. denied) (“To successfully prosecute a claim of negligent [] supervision, . . . a plaintiff is required to show that (1) the employer owed a legal duty to protect third parties from the employee’s actions, and (2) the third party sustained damages *proximately caused by the employer’s breach* of that legal duty.”) (emphasis added).

⁹ *See also Capece*, 2002 WL 31769032, at *6 (comparing *Houser v. Smith*, 968 S.W.2d 542, 546 (Tex. App.—Austin 1998, no pet.) (employer *not* liable when harm to customer of transmission shop resulted from off-duty contact with mechanic rather than status as customer), and *Guidry v. National Freight, Inc.*, 944 S.W.2d 807, 810-11 (Tex. App.—Austin 1997, no writ) (employer *not* liable when apartment tenant not likely to come into contact with truck driver in the course of his duties), with *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178-79 (Tex. Civ. App.—Tyler 1979, writ ref’d n.r.e.) (employer liable for hiring armed security guard with long criminal background)).

¹⁰ *See also Capece*, 2002 WL 31769032, at *6 (citing *Estate of Catlin v. General Motors Corp.*, 936

Whether *Duenez* will be applied to the foregoing examples of imputed or vicarious liability remains to be seen, and will depend, of course, on the sweep of the opinion on rehearing in *Duenez*.

S.W.2d 447, 451 (Tex. App.—Houston [14th Dist.] 1996, no writ)); *DeLuna v. Guynes Printing Co.*, 884 S.W.2d 206, 209-10 (Tex. App.—El Paso 1994, writ denied) (citing *J & C Drilling Co. v. Salaiz*, 866 S.W.2d 632, 639 (Tex. App.—San Antonio 1993, no writ)); *Moore v. Times Herald Printing Co.*, 762 S.W.2d 933, 934 (Tex. App.—Dallas 1988, no writ); *Pinkham v. Apple Computer, Inc.*, 699 S.W.2d 387, 390 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.); *see also Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 526-27 (Tex. 1990).

C. *Romero*: Chapter 33 and the Demise of Broad Form Submission.

1. Background of Broad Form Submission.

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). Thirteen 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 and Hwy. and Pub. Transp. v. Payne, 838 S.W.2d 235, 240 (Tex. 1992).

To see how far away from broad form submission the supreme court has moved in the last five 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).¹¹

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.¹²

2. Overview of *Romero*.

In *Romero*, the Texas Supreme Court 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.

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. *Romero*, 166 S.W.3d at 214. After jury verdict, the trial court

¹¹ 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.

¹² 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).

rendered judgment for plaintiffs on both claims. *Id.* The supreme court considered two issues: (1) whether there was any “clear and convincing evidence” that the hospital acted with malice in credentialing the surgeon to practice in the hospital, (2) whether and there was charge error in the apportionment question.

In turning to be the first issue, the supreme court assumed that the peer review statute, Texas Occupations Code § 16.010(b), required malice in liability cases caused by injured third parties and, likewise, assumed the definition of malice in Civil Practice and Remedies Code § 41.001(7)(b).¹³ Prior to House Bill 4, malice was defined at § 41.001(7)(b) as an act or omission which when viewed objectively involves an “extreme degree of risk, considering the probability and magnitude of potential harm to others,” coupled with “actual subjective awareness of the risk involved,” but “nevertheless proceeding with conscious indifference to the rights, safety, or welfare of others.” In what might be described as an understatement, Justice Hecht noted: “Proof of malice is made more difficult in this setting because peer review communications proceedings are generally confidential and privileged from disclosure.... A plaintiff must prove that the hospital acted maliciously without access to evidence of what happened or did not happen in the credentialing process.” *Romero*, 166 S.W.3d at 214-15.

On the malicious credentialing claim, the evidence showed that the surgeon, Dr. Baker, had been sued ten times for malpractice in a five-year-period, including one suit for operating on the wrong hip of a patient. *Romero*, 166 S.W.3d at 216-17. The evidence also showed that Dr. Baker abused a prescription drug, hydrocodone. *Id.* Dr. Baker had also entered a drug treatment program admitting “he suffered from a pattern of chemical abuse.” *Id.* There was some evidence he continued to abuse hydrocodone. In 1995, Dr. Baker was reported

¹³ Subsection (b) was deleted by HB 4 and replaced with the following provision: malice means a “specific intent by the Defendant to cause substantial injury or harm to the claimant.”

to the State Board of Medical Examiners by at least two persons. *Id.* The Board instituted an investigation into allegations of substance abuse, improper care and treatment of four patients, and recurring health care liability claims. Immediately thereafter Columbia gave full privileges to the doctor. Eighteen months later, the doctor’s office manager resigned and sent a letter to him saying that she was aware of his drug abuse. *Id.* Another hospital, shortly thereafter, suspended Dr. Baker from privileges after he operated on the wrong leg of a patient (a mistake similar to the one he made eight years earlier). *Id.* The chief of staff and chairman of the other hospital’s peer review committee also served on Columbia’s committee, but he testified that he “abstained” from peer review discussions at Columbia about doctors at the other hospital. *Id.*

In July 1998, Dr. Baker assaulted his wife, attempting to strangle her. *Id.* In the same month, Dr. Baker performed elective back surgery on Ricardo Romero. *Id.* During the surgery, the patient lost a lot of blood before Dr. Baker noticed; in the forty-five minutes it took to prepare a transfusion, Romero lost almost all of the blood in his body, and he went into cardiac arrest. *Id.* Though resuscitated, Romero suffered severe and permanent brain injury that left him profoundly disabled and unable to care for himself. *Id.* The supreme court concluded that there was no direct evidence that Dr. Baker was under the influence of drugs during the surgery, but an expert for the Romero’s family, John Eikorn, testified that “for a surgeon to allow so great loss of blood was unheard of and consistent with impairment.” *Id.*¹⁴

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. *Romero*, 166 S.W.3d at 214. Liability was apportioned by the jury in a single apportionment question tied to both liability findings; the jury apportioned responsibility for

¹⁴ One year later, the Board of Medical Examiners closed its investigation with no action against the doctor.

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.*

Plaintiffs insisted that the liability finding of malicious credentialing be made by “clear and convincing evidence” instead of using this standard only on the punitive damages issue. *Id.* The supreme court stated that Plaintiffs were required to prove malicious credentialing only by a “preponderance of the evidence,” but since they had submitted based on the higher “clear and convincing” standard, the supreme court held: “The sufficiency of the evidence must be measured *by the jury charge* when, as here, there has been no objection to it.” *Id.* (emphasis added). The high court held Plaintiffs to the higher standard and reviewed the evidence to determine whether a reasonable trier of fact could have formed a “firm belief or conviction” that Columbia acted with malice in credentialing the doctor. *Id.* (The court of appeals determined there was no evidence of malice; Justice Hecht’s opinion for the majority concluded there was no “clear and convincing evidence of malice”).¹⁵

After assuming, as the court of appeals concluded, that Columbia had actual subjective awareness of the risk posed by Dr. Baker’s drug abuse, the supreme court focused on whether there was evidence that Columbia “was consciously indifferent to this risk. . . . Because of the confidentiality surrounding peer review proceedings, the record is largely silent on which, if any, the steps outlined by [plaintiffs’ expert] Columbia did or did not take. As we have already explained, we cannot infer from this silence that Columbia either did or did not take steps it should have taken with respect to [Dr.] Baker’s drug abuse.” *Id.*

The supreme court’s analysis of the expert’s testimony bears careful review. But one conclusion is unavoidable: instead of reviewing

¹⁵ The Court also noted that it did not believe the Romero’s could satisfy even the ordinary standard of review.

the evidence in the light most favorable to the verdict, the supreme court reviewed same, especially the expert’s testimony, in the light most favorable to the hospital, drawing every inference in favor of the hospital, and against the Plaintiffs:

Had the Romeros offered evidence that Columbia should not have allowed Baker to operate on Romero, there would be some evidence of malice; had such evidence been convincing, it would support recovery. We do not doubt that such evidence of malice is difficult to come by, but the Legislature made recovery for improper credentialing of physicians difficult.

Id. at 224-25.

3. Chapter 33 Portion of the Majority Opinion.

The second issue directly related to Chapter 33 involved apportioning responsibility among the hospital, physicians and a nurse. 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) due to lack of clear and convincing evidence), broad form submission of a single percentage allocation question was error. Justice Hecht 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.” *Romero*, 166 S.W.3d at 214.

The supreme court also gave short shrift to the fact that the apportionment question was submitted in proper broad form “as required by Rule 277 of the Texas Rules of Civil Procedure.” *Id.* at 214. Justice Hecht, again, concluded, “[b]ut 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’s reversal

and required a new trial on the entire 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.* 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.

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.* 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.* Would a court of appeals similarly be “certain” if a proper defendant’s liability question and percentage allocation were omitted from the jury charge, and a plaintiff is found over 51% responsible? As will be seen in §II, 6, that “certainty” was missing when a plaintiff was harmed by the omission.

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.* at 226. 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.”

Romero, 166 S.W.3d at 226.

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.*

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.

Romero, 166 S.W.3d at 230.

4. Was the Chapter 33 Error Invited?

There was a serious question about whether Columbia invited the error at charge conference. 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, 166 S.W.3d at 228. (Emphasis added)¹⁶

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

5. The *Romero* Concurrence.

Justice O’Neill, joined by Justice Medina, concurred in *Romero*: “I write separately because I am deeply troubled by the head-in-the-sand approach the various hospitals and health-care professionals in this case appeared to take in dealing with a drug-impaired physician.” *Romero*, 166 S.W.3d at 231. The dissent stated:

The purposes that underlie the peer-review privilege are commendable and, as our opinion today again illustrates, the protection the privilege affords are strong. The privilege was designed to foster uninhibited and “exacting critical analysis of the competence and performance of physicians and other health-care providers” to improve standards of medical care. [citation omitted]

Here, though, the Hospital seems to view the privilege as a shield to protect itself from injured patients rather than

a vehicle for improving patient care; its brief castigates the Romeros for “attempt[ing] to get around a privilege with bits and pieces of information, rumors, innuendo, gossip, and second-hand information,” even though the privilege left the Romeros no other option. *Romero*, 166 S.W.3d at 232.

Justice O’Neill concluded:

When doctors and hospitals fail to engage in the free exchange of information that the privilege was designed to promote, the Legislature’s purpose is thwarted and the privilege’s underpinnings erode. Should such erosion become pervasive, the privilege deserves to be swept away.

Romero, 166 S.W.3d at 232.

6. 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.* 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.* at 458. The evening before the accident, the defendant had been up all 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

¹⁶ 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).

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. *Bedford*, 166 S.W.3d at 463-64. 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.

D. *Battaglia* and the Timing of Calculation of Prejudgment Interest: Before or After the Application of Settlement Credits to Past or Future Damages?

In *Battaglia v. Alexander*, the Texas Supreme Court addressed three central issues arising from a patient's death, which was the result of two professional associations' negligence during surgery. *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005). A decedent's widow and his parents (the "Alexanders") brought a wrongful death action against two anesthesiologists, Carl Battaglia and Tommy Polk, their respective professional associations as well as the hospital, a nurse, and the anesthesiologists' joint venture. *Id.* at 895. The jury found that the Alexanders sustained past damages of \$1,440,000 and would sustain \$2,160,000 in future damages. *Id.* at 896. The parties had also stipulated to an additional \$57,113.05 for medical and funeral expenses. *Id.* Before trial, the Alexanders accepted settlement payment from other defendants [the hospital and the nurse] totaling \$1,875,000. *Id.* The supreme court analyzed how to calculate prejudgment interest when other parties have settled: "The final issue is how prejudgment interest is to be calculated under Section 16.02 of former article 4590i when, as here, there has been a settlement and

therefore the proportionate responsibility provisions of the Civil Practice and Remedies Code must be applied." *Id.* at 9.

1. The Calculation.

Battaglia and Polk's professional associations, as defendants, contended that the entire settlement amounts should first be deducted from past damages before any prejudgment interest was calculated. *Battaglia*, 177 S.W.3d at 906. This would mean that there would be no prejudgment interest owed by the professional associations because the settlement amount—\$1,875,000—exceeded the past damages found by the jury of \$1,497,113.05. *Id.* The Alexanders contended that prejudgment interest should be computed from the date of the surgery until the date of judgment on the entire amount of past damages found by the jury without regard to any settlement credits, then after calculation of prejudgment interest the settlement credits are applied to the total sum. *Id.* The trial court agreed with the Alexanders, awarding \$367,498.05 in prejudgment interest. *Id.* The trial court then applied the settlement credit to some of the past damages and future damages and prejudgment interest, resulting in a judgment of \$2,149,611.10; the court of appeals affirmed. *Id.*

The supreme court noted the language of former Section 16.02 of former article 4590i:

Computation of prejudgment interest:
Sec. 16.002:

- (a) In a health care liability claim, prejudgment interest may not be charged with respect to a defendant physician or health care provider who has settled a claim before the 181st date after the date the notice of the claim was first mailed to the physician or health care provider.
- (b) In a health care liability claim that is not specified by subsection (a) of this section, the judgment must include the prejudgment interest on past damages found by the trier of fact, but shall not

include prejudgment interest on future damages found by the trier of fact.

The supreme court also noted that Section 16.02 is silent about how settlement credits were to be taken into account, if at all. *Battaglia*, 177 S.W.3d at 906 (observing that Section 33.002 of the Texas Civil Practice and Remedies Code states that credit must be given for settlements).

2. The Majority Opinion.

Justice Owen for the majority:

But nothing in the legislative history of section 16.02 of former article 4590i or former sections 33.012 and 33.013 of the Civil Practice and Remedies Code indicates that the Legislature intended for prejudgment interest to either under- or over-compensate claimants. Interest has long been defined by the Legislature as “compensation for the use, forbearance, or detention of money.” This Court has also defined prejudgment interest—and had done so long before section 16.02(b) was enacted as “compensation allowed by law as additional damages for the lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment..” We confirmed that “[p]rejudgment interest was, and continues to be, compensation allowed by law as additional damages for lost use of the money due as damages during the lapse of time between the accrual of the claim and the date of judgment.” Compensation other than for the lost use of money, as the Alexanders and the dissent concede their calculation would sometime require, is not “interest.” One could call such compensation a windfall from (the claimant’s perspective) or a penalty or fine (from the defendant’s perspective), but it is not “interest.” *Battaglia*, 177 S.W.3d at 908 (citations omitted).

After discussing cases in which the supreme court had found that prejudgment interest was included in calculation of actual damages covered by a damage cap, the majority concluded:

Although past damages may have been incurred over time before the entry of judgment, they should be treated as a lump sum incurred as of the date on which prejudgment interest begins to accrue in accordance with section 16.02. A settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made, then to “principle” thereby reducing or perhaps limiting prejudgment interest from that point in time forward.

Battaglia, 177 S.W.3d at 908.

The majority then dealt with the supreme court’s previous opinion in *C & H Nationwide, Inc. v. Thompson* in this way:

Nor did the Court focus extensively on the issue when we said in *C & H Nationwide, Inc. v. Thompson* that: “[w]e agree that the trial court erred by calculating prejudgment interest using a ‘declining principle’ formula based upon the total damages found in a case with settlement payments and offers credited periodically.” We gave no explanation for our conclusion, contained in a single sentence. The briefing on the matter was similarly scant. Having more thoroughly considered the statutes and the purpose of prejudgment interest, we conclude that this sentence in *C & H Nationwide* was incorrect.

Battaglia, 177 S.W.3d at 909 (citing *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 326-327 (Tex. 1994)).

The majority opinion did not consider the fact that an application of credit in this fashion under-compensates victims in many cases. Clearly, the concern of the majority was that

there never be a single instance of “over-compensation,” as, conceded by the dissent, could occur on occasion. *Battaglia*, 177 S.W.3d at 909.

In determining that settlement credits should never be applied to future damages before calculation of prejudgment interest, Justice Owen stated for the majority: “We conclude that settlements should not be allocated. Since past damages were incurred first, settlement credits should be applied to past damages first, then to future damages.”

In *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003), the supreme court rejected the argument that a damages award should be reduced by settlement amount(s) before determining a physician’s proportionate responsibility for that award. At issue was Chapter 33 of the Civil Practices and Remedies Code, sections 33.012 and 33.013, which provide in relevant part:

§ 33.012. Amount of Recovery

(a) ... the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause or action by a percentage equal to the claimant’s percentage or responsibility.

(b) if the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause or action by a credit equal to one of the following

(1) the sum of the dollar amounts of all settlements ...

§ 33.013. Amount of Liability

(a) Except [a defendant is jointly and severally liable], a liable defendant is liable to a claimant only for the percentage of damages found by the trier of fact equal to that defendant’s percentage of responsibility with respect to the personal injury, property damage, death,

or other harm for which the damages are allowed. Tex. Civ. Prac. & Rem. Code §§ 33.012(a), (b),(1), 33.013(a).

The Texas Supreme Court noted those two sections deal with two distinct concepts: “recovery” and “liability.” Chief Justice Phillips wrote for the majority in *Roberts*:

Section 33.012 refers to “the amount of damages to be recovered by the claimant”, while section 33.013 refers to the “damages found by the trier of fact.” *Id.* The “amount of damages to be recovered by the claimant” under section 33.012 must be reduced by the claimant’s proportionate responsibility and by settlements. No corresponding reduction is prescribed under section 33.013 because the “damages found by the trier of fact” are not affected by settlement or the claimant’s shared responsibility. Thus, damages under these two sections are the same only when the claimant has not settled and shares no responsibility. And although related, the *two sections pose separate inquiries*. Section 33.012 controls the claimant’s total recovery, while section 33.013 governs the defendant’s separate liability.

Under section 33.012, the Williamsons’ total recovery, including amounts received in settlement, is limited to \$2,935,000, so they can receive no more than \$2,466,250 (\$2,935,000-\$468,750) in satisfaction of this judgment. This limit, however, is independent of section 33.013’s limitation on a particular defendant’s percentage of responsibility. And section 33.013(a) specifically pertains to defendants who, like Dr. Roberts here, are not jointly and severally liable. That section provides that a severally-liable defendant’s

monetary liability is calculated by multiplying the damages found by the trier of fact by the defendant's percentage of responsibility. See *C&H Nationwide, Inc v. Thompson*, 903 S.W.2d 315, 321 (Tex 994) ("Section 33.013(a) sets the liability to the claimant of each [liable] defendant at an amount equal to that defendant's percentage of responsibility multiplied by the damages found by the trier of fact."). The trial court did this when it multiplied the jury's damage award by the 15 per cent of proportionate responsibility it assigned to Dr. Roberts. Because Dr. Roberts' liability for \$440,250, does not exceed the limit placed on the amount of damages the Williamsons may recover under section 33.012, no further credit is required.

Roberts, 111 S.W.3d at 122-123 (emphasis added).

In reaching the holding of *Battaglia* relating to a joint and severally liable defendant, Justice Owen writes:

In order for interest to actually compensate for the lost time value of money, no more and no less, the timing of settlement payments must be taken into account. When a nonsettling defendant is *jointly and severally liable*, the "principal" on which interest is calculated is the amount of past damages found by the trier of fact, reduced by the claimant's comparative fault, if any, in accordance with former section 33.012. For example, if a claimant is found 10% responsible, and past damages are found to be \$1,000,000, the principal amount on which prejudgment interest accrues would be \$900,000. Assuming the rate of interest is 10%, and one year's worth of interest has accrued, the claimant would recover

\$990,000. This is consistent with our holding in *Roberts v. Williamson* in which we explained that, in determining former section 33.012's cap on the damages a claimant may recover, the calculation to be performed is based on "the amount of damages to be recovered by the claimant." We also held in both *Columbia Hospital and Horizon/CMS Healthcare Corp. v. Auld* that language similar to "amount of damages to be recovered by the claimant" includes not only actual damages but prejudgment interest as well. Therefore, in calculating the cap imposed by former section 33.012, prejudgment interest is considered.

Although past damages may have been incurred over time before the entry of judgment, they should be treated as a lump sum incurred as of the date on which prejudgment interest begins to accrue in accordance with section 16.02. A settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made, then to "principal," thereby reducing or perhaps eliminating prejudgment interest from that point in time forward. *Id.*

Battaglia, 177 S.W.3d at 909 (internal footnotes omitted and emphasis added).

Following the holding of the opinion, Justice Owen added *dicta* regarding a severally liable defendant which arguably allows such a defendant to get the benefit of *both* the dollar and percentage credit, something rejected in *Roberts*:

As we explained in *Roberts v. Williamson*, both former sections 33.012 and 33.013 must be taken

into account in determining what a claimant will recover and what a particular defendant will owe.¹⁷ Former section 33.013's limitation requires that, when a defendant is less than 51% responsible and therefore is not jointly and severally liable, the defendant's liability is limited to the percentage of the damages found by the trier of fact (the jury's or trial court's award of damages) equal to the percentage of responsibility assigned to that defendant by the trier of fact. *When a defendant is not jointly and severally liable for the damages a claimant has sustained, this means the "principal" is only the specified percentage of the "damages" found by the trier of fact. Interest would accrue only on that amount, and a settlement payment would be applied first to accrued interest on that amount as of the date of the settlement payment, then to any remaining principal, and interest would accrue on any remaining principal from that date forward.*

Id. (emphasis added).

Justice Owen seems to both rely on *Roberts* (in the previous paragraph) and then to distinguish it:

In *Roberts v. Williamson and Drilex Systems, Inc. v. Flores*, we indicated that the limit on a claimant's recovery contained in former section 33.012 is determined by deducting settlement credits from the amount of damages awarded by the factfinder before prejudgment interest is calculated. However, the calculation of prejudgment interest was not at issue in either

of those cases, and there was no briefing or argument on the subject. We did not focus on the issue as we are called upon to do today. *Id.*

It remains to be seen how the courts of appeal will deal with the *dicta* in *Battaglia* regarding severally liable defendants, and whether severally liable defendants will receive the benefit of *both* the percentage credit (the obvious result when "principal" for purposes of calculating interest is the percentage allocated to that defendant, which of course already necessarily represents a reduction due to the settling defendant's percentage allocation) and credit for the dollar amount of settlement in calculating prejudgment interest.

3. The Dissent – A Strict Plain Textualist Approach.

Justice Brister, joined by Chief Justice Jefferson and by Justice O'Neill, concurred in other portions of the opinion, but dissented from the majority on the issue of application of settlement credits and calculation of prejudgment interest. Justice Brister:

The question there [sic] is whether to calculate prejudgment interest under former Article 4590i, Section 16.02, before or after applying settlement credits. Because the statute unambiguously requires the former, we should affirm; because the Court construes the statute otherwise, I respectfully dissent.

Battaglia, 177 S.W.3d at 913.

The dissent relied primarily on language of 16.02(b) which says that in all other cases not involving settlement within 180 days of notice of claim "the judgment must include prejudgment interest on past damages *found by the trier of fact*:"

That part mandates "prejudgment interest on past damages found by the trier of fact," and there is nothing ambiguous about that. It cannot

¹⁷ Arguably *Roberts* actually said the two sections are separate and should not be conflated.

include settlement credits, as jurors are not informed of settlements and make no such credits. Three courts of appeal have so construed this statute, and we have so construed the same language in a different statute only two years ago in *Roberts v. Williamson* that “damages found by the trier of fact” means the jury’s verdict *before* settlement credits. Unless the statute is unconstitutional (which no one suggests), it is irrelevant that we think this might be too much or too little, or that we would calculate interest some better way.

Battaglia, 177 S.W.3d at 913.

In an apparent fit of candor, the dissent noted:

But our cases on interest are all over the map; there has never been a single rule for calculating prejudgment interest. The Court overrules some of those that get in the way, because either the briefing was “scant” or we did not “focus” on the issue. This much recalibrating shows that in fact there is no standard way to calculate interest.

Battaglia, 177 S.W.3d at 913.

The dissent concluded:

If a settlement occurs years after the original occurrence, a claimant certainly has lost the use of money in the interim. But if the settlement occurs early on, that is not the case. Nevertheless, except for settlements within the first 180 days, section 16.02 makes no exceptions. This may be rather rough justice, but it is the only way to give effect to the statute’s “window.” “No human document has ever been written or can be written that will meet every conceivable contingency.” In reality, medical expenses may be incurred, pain suffered, and wages lost throughout the entire pretrial period. Perhaps a

“pure” calculation of prejudgment interest would measure interest at daily rates on each dollar of damages from the day it was incurred until the day it was retired. Compared to that, the Court’s assumption that all past damages occur on the day of injury is rather rough justice, too. The Legislature is not required to draft perfect statutes with logical consistency in every application.¹⁸

Battaglia, 177 S.W.3d at 914 (citations omitted).

E. Chapter 33 Applies to Fraud Cases: But What Does That Mean?

It is now generally accepted that Chapter 33 requires the apportionment of responsibility among tortfeasors in a fraud case.¹⁹ *JCW Electronics, Inc. v. Garza*, 176 S.W.3d 618, 626 (Tex. App.—Corpus Christi 2005, pet filed); *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 it is unclear how this rule applies when a plaintiff’s negligence is alleged to have caused the same damages as the defendant’s fraudulent conduct.

The well-settled rule is that a person committing fraud cannot defeat a claim for damages based upon the argument that the party defrauded

¹⁸ Citations omitted.

¹⁹ In the statutory fraud context, at least one court has rejected the application of Chapter 33. In *Davis v. Estridge*, the appellate court held that Chapter 33 did not apply to *statutory fraud*. *Davis v. Estridge*, 85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied). This decision was based on the old common law rule that a plaintiff’s own negligence is never a defense to fraud. *Id.*; *see also Plains Cotton Cooperative Assoc. v. Wolf*, 553 S.W.2d 800 (Tex. Civ. App.—Amarillo 1977, writ ref’d n.r.e.); *Mayes v. Stewart*, 11 S.W.3d 440 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

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)). For example, 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.).

The only recent case to address fraud in a Chapter 33 cases did not squarely address the apples-to-oranges problem. In *JCW Electronics, Inc. v. Garza*—one of comparing negligence to intentional conduct the more significant recent cases regarding Chapter 33—the court held that the Plaintiffs responsibility barred recovery on a fraud claim. 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. *JCW Electronics, Inc. v. Garza*, 176 S.W.3d 618 (Tex.App.—Corpus Christi 2005, no pet.). The inmate died after he used a cord from a telephone in his cell to hang himself. *Id.* The plaintiffs alleged negligence, breach of implied warranty of fitness for a particular purpose, misrepresentation, breach of contract and fraud. *Id.* 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. *Id.*

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.”

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.

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 anything 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).

F. Chapter 33 and the UCC.

1. Chapter 33 Does Not Apply to a UCC Conversion Claim.

In *Southwest Bank*, the 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.*

Another recent case presented a variation on the issue of whether or not the responsible third-party scheme under Chapter 33 is available in UCC and contract cases. *Turner Constr. Co. of Tex. v. Pharr-San Juan-Alamo Independent School District*, No. 13-03-520-CV, 2006 WL 648210 (Tex. App.—Corpus Christi, Mar. 16, 2006, pet. filed). Here, in order to circumvent a defense of sovereign immunity raised by a school district, the defendant/responsible third-party plaintiff argued that the claims against the putative responsible third-party sounded in contract, not tort, based on a construction contract. *Id.* at *1. The appellate court held that the school district’s sovereign immunity had been waived, as it was most likely that plaintiff’s claims sounded in contract, and reversed and remanded for further proceedings. However, on remand the school district should use the appellate court’s ruling to argue that, since plaintiff’s claims sound in contract, he is barred from asserting a Ch. 33 third party claim.

2. Chapter 33 Does Not Apply to a UCC Warranty Claim.

In *JCW Electronics, Inc. v. Garza*, 176 S.W.3d 618 (Tex. App.—Corpus Christi 2005, pet. filed), the appellate court was asked to determine whether the plaintiffs’ recovery for their implied warranty claims was barred by Chapter 33, given the jury’s finding that the injured party was more than 50% responsible for his death. *Id.* at 632. JCW argued that since the case was based upon personal injuries, plaintiffs’ implied warranty claim sounded in tort rather than contract. *Id.* The court stated:

One of the primary purposes underlying the UCC was to make uniform the law among various jurisdictions. The UCC was adopted

as a comprehensive and integrated act to facilitate the continued expansion of commercial practices. To achieve that end, Article 2 of the UCC supplies a complete framework of rights and remedies for transacting parties.

Id.

The Court went on to state that, given the “comprehensive framework” of Article 2, as well as the Texas Supreme Court’s refusal to apply comparative liability statutes to Article 2, extending Chapter 33’s proportionate responsibility scheme to cover implied warranty claims would “potentially disrupt and override the UCC’s express purpose of furthering uniformity among the states.” *Id.* at 633. As such, the court held that implied warranty claims under the UCC were not subject to the proportionate responsibility scheme set out under Chapter 33. *Id.* As such, the plaintiffs were allowed to recover damages for their implied warranty claims in spite of the jury’s findings that the inmate was more than 50% responsible for his death. *Id.*

****Fright Number Fourteen****

Don’t give up in a UCC Warranty Case! Although the court has decided the issue in UCC conversion cases, the UCC warranty issue is not entirely settled. So don’t forget to request a submission and preserve error just in case.