

# RESPONSIBLE THIRD PARTIES

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## 1. Introduction

In Texas tort law, the “responsible third party” is anything but. He is not really a “party”,<sup>2</sup> and he is not really “responsible.”<sup>3</sup> He has but one reason to exist: that is, to allow a liable defendant to avoid joint and several liability.

Because joint and several liability is an anathema for tort reformers, the “responsible third party” (“RTP”) is a favored child of tort reform. The RTP was first created by the 1995 legislature.<sup>4</sup> Then, in the sweeping tort reform of House Bill 4, the 2003 legislature transformed that creation into its present incarnation.<sup>5</sup>

To understand the RTP and the impact of the 2003 legislation, it is helpful to understand the state of the law prior to the RTP’s creation. The paper will first discuss historic contribution schemes and joint and several liability, and then the 1987 tort reform statute. With that backdrop, the paper will then discuss the impact of the 1995 RTP statute and the 2003 RTP statute.

## 2. Contribution Schemes in Texas

The RTP only makes sense in terms of rights of contribution. And, sadly, the history of contribution in Texas is chaotic. The rules of contribution have been characterized as “truly arcane,”<sup>6</sup> and “a hodgepodge.”<sup>7</sup>

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<sup>2</sup> A “party” refers to a person by or against whom a lawsuit is brought. *See* BLACK’S LAW DICTIONARY, at 1010 (5th ed. 1979).

<sup>3</sup> “Responsible” means “[l]iable; legally accountable or answerable.” *See* BLACK’S LAW DICTIONARY, at 1180 (5th ed. 1979).

<sup>4</sup> Acts 1995, 74th Leg., ch. 136, §1, eff. Sept. 1, 1995; *see* TEX. CIV. PRAC. & REM. CODE § 33.004.

<sup>5</sup> Acts 2003, 78th Leg., ch. 204, §§ 4.03, 4.04, 4.10(2), eff. Sep. 1, 2003; *see* TEX. CIV. PRAC. & REM. CODE § 33.004. House Bill 4 (“H.B. 4”) contained twenty one chapters; the responsible third party provisions are found in Chapter 5.

<sup>6</sup> *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 18 (Tex. 1991)(Doggett, J., dissenting).

<sup>7</sup> *Willingham Auto World v. Jones*, 833 S.W.2d 232, 234 (Tex. App.—Tyler 1992, writ denied)(“Texas has developed a hodgepodge set of rules governing indemnity and contribution.”).

Contribution has been defined as “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.”<sup>8</sup> Because contribution is an allocation of the burden of loss among defendants, rather than a complete shift of the burden of loss from one defendant to another, contribution is distinct from indemnity.<sup>9</sup>

Rights of contribution did not exist at common law.<sup>10</sup> The early courts made few allowances for co-tortfeasors and cared little about “adjustment of their affairs.”<sup>11</sup> To demonstrate this attitude, Professor Hodges cited the *Highwayman’s* case.<sup>12</sup> In that case, one highwayman brought suit against another highwayman for an accounting of the plunder they had obtained in a “joint venture.” In what may be termed the ultimate sanction for frivolous pleading, the court dismissed the bill, adjudged costs against plaintiff’s counsel, held both of plaintiff’s solicitors in contempt, fined one of the solicitors and deported the other, and ordered both the plaintiff and the defendant beheaded.<sup>13</sup> Quoting Prosser, Professor Hodges wrote, “In short, contribution was not allowed.”<sup>14</sup>

As tort law evolved from offenses of moral turpitude to negligence to liability without fault, courts and others became concerned with an equitable distribution of the burden of the common wrong among those responsible.<sup>15</sup> The doctrine of contribution developed as a means to allocate the burden of loss among joint tortfeasors.

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<sup>8</sup> *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977).

<sup>9</sup> Indemnity shifts “the entire loss from one tortfeasor to another.” *B & B Auto Supply, Sand Pit and Trucking Co. v. Central Freight Lines*, 603 S.W.2d 814, 816 (Tex. 1980). With the advent of schemes of comparative fault or comparative causation, common law indemnity was all but abolished in Texas. *Id.*; see also *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819 (Tex. 1984). A “vestige” of common law indemnity exists only in pure vicarious liability or innocent retailer situations. *Bonniwell*, 663 S.W.2d at 819.

<sup>10</sup> *Lubbock Manufacturing Co. v. Perez*, 591 S.W.2d 907, 922 (Tex. Civ. App.—Waco 1979, no writ).

<sup>11</sup> See Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 Tex. L. Rev. 150 (1947)(hereafter “Hodges”).

<sup>12</sup> *Id.* (citing *Everet v. Williams*, Ex. (1725), 9 L.Q. Rev. 197 (1893)).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d 19, 22 (Tex. 1987)(Ray, J., dissenting).

Texas was one of the “pioneers” in the adoption of legislation that imposed a duty on tortfeasors to make contribution.<sup>16</sup>

### A. The Original Contribution Statute

Texas’ first contribution statute was enacted in 1917 and, although its impact has been modified, the statute still exists today much in its original form.<sup>17</sup> That statute expressly applied to “any suit on an action arising out of or based on tort . . . .”<sup>18</sup>

The language of the statute is straightforward. A defendant who pays a judgment is entitled to a pro rata contribution from other liable defendants.<sup>19</sup> Thus, if there were two liable defendants, each was required to contribute one-half to the judgment; if there were three liable defendants, each was required to contribute one-third, and so forth. If any defendant were insolvent, the other defendants have contribution rights for a pro rata share based on the number of solvent defendants.<sup>20</sup> Each defendant who paid more because of the insolvency has a right of action against the insolvent defendant (for what it’s worth) for the excess amount caused by the insolvency.<sup>21</sup> The payment of a judgment is a prerequisite to the right of contribution.<sup>22</sup>

Although the applicability of this statute has been limited by the enactment of the modern contribution statutes, the original contribution statute continues to apply to cases in which judgment is based upon a finding of a tort to which a comparative causation scheme does not apply—such as intentional torts.<sup>23</sup>

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<sup>16</sup> Hodges, *supra* note 11, at 151.

<sup>17</sup> TEX. CIV. PRAC. & REM. CODE § 32.001, et seq. (former TEX. REV. CIV. STAT. ANN. art. 2212).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at § 32.002

<sup>20</sup> *Id.* at § 32.003(b).

<sup>21</sup> *Id.* at § 32.003(c)

<sup>22</sup> *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d at 21 (citing cases).

<sup>23</sup> See *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 6 (Tex. 1991); *Service Lloyds Ins. Co. v. Greenhalgh*, 771 S.W.2d 688, 692-93 (Tex. App.—Austin 1989), *aff’d*, 787 S.W.2d 938 (Tex. 1990).

## B. Comparative Negligence

The original contribution statute continued as Texas' only form of contribution until 1973, when Texas enacted the comparative negligence statute.<sup>24</sup> Although that statute only applied to negligence cases, the statute was hailed as “the most explicit and comprehensive of any statute in the United States” in dealing with the rights of contribution.<sup>25</sup>

Prior to enactment of the statute, Texas common law held that if the tort plaintiff were guilty of any contributory negligence, no matter how slight, that plaintiff was barred from recovery of compensation for his or her injuries.<sup>26</sup> The comparative negligence statute introduced a “modified” form of comparative negligence; the plaintiff was only barred if his negligence exceeded that of the defendant (or defendants).<sup>27</sup>

With regard to contribution, “[o]ther than their general subject matter, there is little similarity” between the original contribution statute and the comparative negligence statute.<sup>28</sup> While the original contribution statute established a pro rata contribution scheme, the comparative negligence statute opted for contribution in direct proportion to the percentage of negligence attributable to each defendant.<sup>29</sup>

Under the statute, a defendant *was* jointly and severally liable unless the defendant's negligence was less than the plaintiff's negligence.<sup>30</sup> The defendant did not pay more than its share of liability unless that defendant was jointly and severally liable.<sup>31</sup> Rights of contribution were triggered when a defendant *paid* more than its proportionate share of liability.<sup>32</sup> The defendant who paid more than its share of liability was entitled to seek

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<sup>24</sup> See Former TEX. CIV. PRAC. & REM. CODE § 33.001, et seq. (former TEX. REV. CIV. STAT. ANN. art. 2212a).

<sup>25</sup> See *Cypress Creek Utility Service Co., Inc. v. Muller*, 640 S.W.2d 860, 865 (Tex. 1982).

<sup>26</sup> See, e.g., *Parrott v. Garcia*, 436 S.W.2d 897, 901 (Tex. 1969); *Southern Pine Lumber Co. v. Andrade*, 132 Tex. 372, 124 S.W.2d 334, 335 (1939).

<sup>27</sup> Former TEX. CIV. PRAC. & REM. CODE § 33.001(a); *Hernandez v. Southern Pac. Trans. Co.*, 641 S.W.2d 947 (Tex. App.—Corpus Christi 1982, no writ).

<sup>28</sup> *Beech Aircraft Corp. v. Jinkins*, 739 S.W.2d at 21.

<sup>29</sup> Former TEX. CIV. PRAC. & REM. CODE § 33.012.

<sup>30</sup> *Id.* at § 33.003

<sup>31</sup> *Id.*

<sup>32</sup> *Charter Builders v. Durham*, 683 S.W.2d 487, 489 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

contribution from all liable defendants for any excess payment, in proportion to the percentage of negligence attributed to each defendant.<sup>33</sup>

### C. *Duncan v. Cessna*

Because the comparative negligence statute only applied to negligence cases, the courts could not apply it to products liability cases, and the courts were forced to use the original contribution statute.<sup>34</sup> Thus, even after the legislature had announced its preference for comparative fault, Texas products law was mired in an “all or nothing” common law and the pro rata contribution scheme of the original contribution statute.<sup>35</sup> The Supreme Court of Texas expressly invited the legislature to correct this anomaly.<sup>36</sup> Seven years later, in the face of legislative inaction, the Supreme Court devised its own common law contribution scheme to apply in products cases that involved strict liability, mixed theories of strict liability and negligence, and UCC breach of warranty. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

In *Duncan v. Cessna*, the Court opted for a pure “comparative causation” scheme, in which a plaintiff’s contributory negligence was compared to the defendant’s product or conduct.<sup>37</sup> Inasmuch as product liability was liability without fault, the plaintiff was permitted to recover from the defendant without regard to the plaintiff’s percentage of fault (unless the plaintiff was solely at fault). Thus, if a jury found that 90 percent of plaintiff’s injuries were caused by the plaintiff, and 10 percent of the plaintiff’s injuries were caused by the defective product, the plaintiff was entitled to recover 10 percent of his damages.<sup>38</sup>

The Court also opted for a scheme of “pure” joint and several liability. Under this scheme, all defendants are jointly and severally liable, “subject to a right of contribution for payments in excess of the defendant’s percentage share.”<sup>39</sup>

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<sup>33</sup> Former TEX. CIV. PRAC. & REM. CODE § 33.012.

<sup>34</sup> *See General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977)

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

### 3. Joint and Several Liability

Joint and several liability is essential for contribution—unless there is joint and several liability, there can be no contribution. In other words, if a defendant is not jointly and severally liable, then that defendant will not ever have to pay in excess of its share of liability. And, if that defendant does not have to pay in excess of its share of liability (that is, it pays only its share of liability, no more), then that defendant will not need to seek contribution for payment in excess of its share of liability. Thus, the only way that a defendant would ever be liable for more than its share of liability would be if that defendant were jointly and severally liable. That is why an understanding of joint and several liability is the key to understanding the RTP.

Our modern rules of joint and several liability can be traced to an opinion over fifty years ago by the Supreme Court of Texas—*Landers v. East Tex. Salt Water Disposal Co.*<sup>40</sup> The earlier rule established in *Sun Oil Co. v. Robicheaux*,<sup>41</sup> was that each tortfeasor who acts independently is only liable for the damages that tortfeasor caused, even if his act contributed with others to cause a common injury—unless the plaintiff established a “concert or unity of design.”<sup>42</sup> In *Landers*, the Court discussed the policy behind joint and several liability. Referring to an article by Professor Wigmore, the Court noted that joint and several liability:

[H]ad its inception in the need of the law, bent on justice, to relieve a plaintiff of the intolerable burden of proving what share each of two or more wrongdoers contributed to the plaintiff's injuries, and that the burden is just as intolerable and the need for relief therefrom is just as great when the independent tortious acts of multiple defendants contribute to a plaintiff's indivisible injuries as when the acts are done in concert and of common design.<sup>43</sup>

The Court noted that under the then current judicial philosophy “it is better that the injured party lose all of his damages than that any of several wrongdoers should pay more of the damages than he individually and separately caused.”<sup>44</sup> The Court held that this should not be the law, and overruled *Sun Oil Co. v. Robicheaux*.<sup>45</sup> The Court announced the new rule of joint and several liability:

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<sup>40</sup> *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (Tex. 1952).

<sup>41</sup> *Sun Oil Co. v. Robicheaux*, 23 S.W.2d 713 (Tex. Comm. App. 1930)

<sup>42</sup> *Id.* at 715.

<sup>43</sup> *Landers*, 248 S.W.2d at 733.

<sup>44</sup> *Id.* at 734.

<sup>45</sup> *Id.*

Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers, all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.<sup>46</sup>

That rule applied to the original contribution statute, which was then the only form of contribution in Texas. However, each contribution scheme that followed had its own brand of joint and several liability.

Under the comparative negligence statute, all defendants were jointly and severally liable unless their negligence was less than that of the plaintiff.<sup>47</sup> Under the *Duncan v. Cessna* scheme, as we have said, all defendants who jointly contributed to the indivisible injury were jointly and severally liable.<sup>48</sup> The Court explained the policy behind the rule:

The existence of joint and several liability becomes important when one or more defendants are insolvent. When a defendant is insolvent, the goal of allocating the loss among those responsible cannot be achieved. Nevertheless, joint and several liability in such cases furthers the fundamental policy of tort law to compensate those who are injured.<sup>49</sup>

Of course, the judicially created *Duncan v. Cessna* contribution scheme was short-lived, having been the principal inspiration for the 1987 tort reform. From 1987 onward, each new version of tort reform attempted to chip away at joint and several liability.

#### **4. 1987 Tort Reform**

The first “tort reform” statute in 1987 has been called “one of the more complex comparative fault statutes” in the United States.<sup>50</sup> For our purposes, as a backdrop for the creation of the RTP, we will consider two aspects of that statute.

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<sup>46</sup> *Id.*

<sup>47</sup> Former TEX. CIV. PRAC. & REM. CODE § 33.012.

<sup>48</sup> *Duncan*, 665 S.W.2d at 429.

<sup>49</sup> *Id.*

<sup>50</sup> Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, Tort & Ins. Law J. 482, 493 (1988).

## **A. Plaintiff Controls Submission**

The statute mandated submission of the comparative responsibility of the claimant, any settling person, and any defendant.<sup>51</sup> “Defendant” was defined as a party from whom the claimant sought recovery at the time of submission.<sup>52</sup> Because the plaintiff can choose whom to sue, and with whom to settle, “the plaintiff has control over which parties and nonparties are submitted to the trier of fact for a determination of comparative responsibility percentage findings.”<sup>53</sup>

## **B. Thresholds for Joint and Several Liability**

The plaintiff’s control over submission of the first comparative issue is important because it is the first comparative issue that determines whether a defendant is, or is not, jointly and severally liable.

The 1987 statute imposed “thresholds” for joint and several liability: if the claimant was blameless, the defendant would be jointly and severally liable if its percentage of responsibility was 11 percent or more; if the claimant was found to have fault, the defendant would be jointly and severally liable if its percentage of responsibility was 21 percent or more.<sup>54</sup> In toxic tort cases, all defendants were jointly and severally liable without regard to the percentages of responsibility.<sup>55</sup>

## **5. 1995 Tort Reform**

The 1995 tort reform hearings began with a plea from then Governor George W. Bush to reform the joint and several liability laws in Texas:

. . . Texas must reform the current Joint and Several Liabilities Statute. It is not fair that a business or a person pay for the irresponsible behavior of

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<sup>51</sup> Former Tex. Civ. Prac. & Rem. Code §33.003

<sup>52</sup> *Id.* at §33.011(2).

<sup>53</sup> *Texas Cab Co. v. Giles*, 783 S.W.2d 695, 696 (Tex. App.—El Paso 1989, no writ).

<sup>54</sup> Former TEX. CIV. PRAC. & REM. CODE §33.013(b)(1) and (c)(1). Note that there was a distinction between negligence cases and products cases. In negligence cases, if the claimant is at fault, the defendant is jointly and severally liable if its percentage of responsibility is 21 percent or more and (retaining the old “exception” from the comparative negligence statute) the defendant’s percentage is greater than the claimant’s percentage. *Id.* at § 33.013(b)(1), (2). There was no such limitation in products cases.

<sup>55</sup> *Id.* at §33.013(2), (3).

someone else. Such a concept defies the philosophy of personal accountability that the people of Texas endorsed on November the 8th.<sup>56</sup>

As could be expected, the tort reform hearings contain a lively debate, ranging from pleas for no joint and several liability at all<sup>57</sup> to pleas to protect “the innocent victim.”<sup>58</sup> At the end of the process, the legislature enacted two measures to reduce joint and several liability:

#### **A. The 51% Threshold**

Under the newly-dubbed “Proportionate Responsibility”<sup>59</sup> statute, the legislature raised the bar of joint and several liability to 51 percent, across the board. In other words, a defendant is not jointly and severally liable unless its percentage found by the jury is 51% or more.<sup>60</sup> Thus, only *one* defendant can ever be jointly and severally liable.<sup>61</sup> Which raises the rhetorical question—who is he *jointly* liable with?

The legislature enacted a threshold for joint and several liability for toxic torts (where there was not one) of 15 percent or more<sup>62</sup>, and created a Penal Code exception which made all defendants who commit certain violations of the Penal Code jointly and severally liable without regard to the percentage of responsibility assigned by the jury.<sup>63</sup>

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<sup>56</sup> See Senate Economic Development Committee, Transcript 2/2/95, Tape 1, pp. 1-2.

<sup>57</sup> *Ibid*, Testimony of Larry York, Texans for Lawsuit Reform, Tape 5, pp. 4-5.

<sup>58</sup> *Ibid*, Testimony of Mike Gallagher, Texas Trial Lawyers Association, Tape 5, pp. 22-23.

<sup>59</sup> For unexplained reasons, in 1995, the Texas legislature changed the name of Chapter 33 of the Texas Civil Practice and Remedies Code from the Comparative Responsibility statute to the Proportionate Responsibility Statute. This completes an interesting transition—from the “comparative negligence” of the comparative negligence statute, to the “comparative causation” of *Duncan v. Cessna*, to the “comparative responsibility” of the 1987 statute, to the “proportionate responsibility” of the 1995 statute.

<sup>60</sup> TEX. CIV. PRAC. & REM. CODE §33.013(b).

<sup>61</sup> See *Allied Signal, Inc. v. Moran*, 2003 WL 22014805 at \*6 (Tex. App.—Corpus Christi 2003, no pet.) (“By the plain language of section 33.013(b), only one liable defendant may be held jointly and severally liable for the total damages recoverable by the claimant because only one liable defendant may be assigned responsibility greater than fifty percent.”).

<sup>62</sup> TEX. CIV. PRAC. & REM. CODE § 33.013(c).

<sup>63</sup> *Id.* at §§ 33.002(b), (d), (e), (g). This is a very unusual section which imports criminal law into a civil law context. The impact of that section is beyond the scope of this paper.

## **B. Creation of Responsible Third Party**

The other significant measure enacted by the Texas legislature in 1995—a measure that was designed to reduce the likelihood that a defendant will be found jointly and several liable—is the creation of the “responsible third party.”<sup>64</sup> There is no doubt that the sole purpose of the creation of the RTP was to help eliminate joint and several liability. When Representative Junell introduced the bill to the House, he said:

A new area [is] called joining third parties. In joining third parties, traditionally the fault that was submitted to the jury was only those third parties who the plaintiff had joined, who he had actually sued. The defendant can sue third parties for contribution, but it didn't lessen the effect of joint and several liability on that defendant that had been sued by the plaintiff, and another defendant had not been joined by, had not been sued by the plaintiff. What we do in this bill is to allow the defendant to join third parties and their fault will be submitted to the jury or to the judge, dependant upon which case is being tried.<sup>65</sup>

The two measures combined to reduce the potential for a defendant to be found jointly and severally liable.

### **6. 1999 Attempted Tort Reform.**

The tort reformers were unsuccessful in the 1999 legislature, when they attempted to pass an amended “responsible third party” bill. That bill, SB 614, sought to submit to the jury “each responsible third party who cannot feasibly be joined,” including an apprehended criminal in a premises case or the plaintiff’s employer in a third party worker’s compensation case.<sup>66</sup> According to one source, that bill died an unceremonious death when it was revealed that the alleged “horror” stories that the tort reformers were using to sell the bill were rife with exaggeration and misrepresentation.<sup>67</sup>

### **7. 2003 Tort Reform**

Much has already been written about the sweeping changes in the law wrought by HB 4. The RTP was not spared.

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<sup>64</sup> TEX. CIV. PRAC. & REM. CODE § 33.004, entitled “Joinder of Responsible Third Parties.”

<sup>65</sup> See House State Affairs Committee, 4/4/95, Tape 2.

<sup>66</sup> Hartley Hampton, *Tort Reform, Y2K, and Other Litigation Issues*, Vol. 62, No. 8: Tex. Bar. J., at 798 (Sept. 1999).

<sup>67</sup> *Id.* at 798-99.

As described by one of the proponents of further reform, “HB 4 finishes the job started by the 1995 legislature by allowing submission of all potentially responsible parties to juries for the determination of fault. The current practice of preventing the submission of some potentially responsible parties is not fair.”<sup>68</sup>

By “finish[ing] the job started by the 1995 legislature,” the tort reformers meant that they were removing all procedural and substantive restrictions on who could be a responsible third party—potentially turning jury submission of proportionate responsibility into a free-for-all, where the defendant could freely add anyone, even unknown parties, to the mix. The specifics of that legislation is discussed below.

## **8. “Responsible Third Party”**

The “responsible third party” had no progenitor in the law. It is a creation of the 1995 legislature, formed to lessen the defendant’s potential to be jointly and severally liable. Under the 1995 statute, there were a number of procedural and substantive restrictions on who could be added as a RTP. HB 4 removed all of those restrictions. Now, *anyone* can be a responsible third party—even persons or entities that the plaintiff is forbidden to sue, even persons or entities outside the court’s jurisdiction, even persons or entities that may not exist. The contrasts between the 1995 statute and the 2003 statute are discussed below.

### **A. Distinction Between RTP and Contribution Defendant**

A primary argument for tort reformers was that the jury was not permitted to consider the fault of all who were responsible. But, the 1987 statute did allow the jury to consider the responsibility of parties other than those whom the plaintiff sued. The 1987 statute created a party known as a “contribution defendant.”<sup>69</sup>

The “contribution defendant” is defined as a defendant, counter defendant or third-party defendant from whom any party seeks contribution “but from whom the claimant seeks no relief at the time of submission.”<sup>70</sup> The “contribution defendant” is submitted to the jury in a *second* comparative issue that compares only the responsibility of each defendant and each contribution defendant.<sup>71</sup>

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<sup>68</sup> Testimony of Richard Trabulsi, President of Texans for Lawsuit Reform, House Civil Practices Committee, 2/26/03, Tape 1.

<sup>69</sup> TEX. CIV. PRAC. & REM. CODE § 33.016.

<sup>70</sup> *Id.* at § 33.016(a).

<sup>71</sup> *Id.* at § 33.016(c)

The reason that the contribution defendant is not attractive to the defendant is that the defendant cannot submit the contribution defendant in the *first* comparative issue—the issue that determines joint and several liability. The prospect of being able to seek contribution from a contribution defendant only arises if the defendant has been determined to be jointly and severally liable in the first issue, and has *paid* in excess of its share of liability.<sup>72</sup>

As an example, consider a fuel fire case. The plaintiff, a passenger injured in the car fire, wishes to sue the manufacturer for a defective intake manifold (whatever that is). The defendant wishes to bring into the case the drunk driver. However, the plaintiff does not want the jury to focus on the drunk driver, but wants the jury to focus on the manufacturer. So, the plaintiff chooses not to sue or settle with the drunk driver. Since, prior to 1995, the first comparative issue included only the claimant, the settling person, and defendants whom the plaintiff has sued,<sup>73</sup> the drunk driver is not included in the first comparative issue. Thus, the drunk driver's negligence is not compared with the negligence of the manufacturer. This means that the manufacturer cannot shift the blame to the drunk driver. Of course, the manufacturer could bring the drunk driver in as a contribution defendant, and have a second issue comparing the manufacturer's responsibility with the drunk driver's responsibility, but the plaintiff does not care about that issue. In order to seek contribution against the drunk driver, the manufacturer would have to *pay* the plaintiff.<sup>74</sup>

In contrast, the responsible third party *can be* submitted in the first issue—where that submission can reduce the defendant's risk of joint and several liability. And, as we have seen, if the defendant is not jointly and severally liable, then the defendant never has to seek contribution, and could care less about the contribution defendant.

## **B. Who Qualifies?**

Prior to the 2003 legislation, there were a number of restrictions on who could be a RTP. Although it is still important to determine whether Chapter 33 applies at all, the restrictions of the 1995 statute were removed by the 2003 statute.

### **(1) Applicability of Chapter 33**

The first requirement to determine if one can bring in a responsible third party is whether Chapter 33—the Proportionate Liability Statute—applies to the cause of action.

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<sup>72</sup> See TEX. CIV. PRAC. & REM. CODE § 33.015(a).

<sup>73</sup> Former TEX. CIV. PRAC. & REM. CODE § 33.001.

<sup>74</sup> See TEX. CIV. PRAC. & REM. CODE § 33.015(a).

That requirement was addressed last year by the Supreme Court of Texas in *Southwest Bank v. Information Support Concepts, Inc.*<sup>75</sup>

In that case, one of the plaintiff's employees stole company checks, totaling more than \$300,000, and deposited them into her Southwest Bank account.<sup>76</sup> When the plaintiff sued the bank for conversion under the UCC,<sup>77</sup> the bank sought to join the thief as a responsible third party.<sup>78</sup> The Supreme Court held that the trial court properly denied joinder of the RTP since the "Legislature did not intend to upset the UCC's carefully balanced liability provisions by applying Chapter 33 to a UCC-based conversion claim."<sup>79</sup> Similarly, in *F.F.P. Operating Partners, L.P. v. Dueñez*,<sup>80</sup> a statutory Dram Shop cause of action, the Supreme Court held that there was no need to submit the intoxicated driver as a RTP because, by statute, the seller was vicariously liable for the driver's conduct anyway.<sup>81</sup>

There have been a number of other courts, in other contexts, that have held that Chapter 33 does not apply to certain causes of action.<sup>82</sup> Where Chapter 33 does not apply, the "responsible third party" does not apply.

## (2). The 1995 Statute

The 1995 statute imposed certain restrictions on who could qualify as a RTP. Those restrictions are discussed below.

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<sup>75</sup> 2004 WL 2366171, No. 02-0946 (Tex. October 22, 2004).

<sup>76</sup> *Id.* at \_\_\_\_.

<sup>77</sup> TEX. BUS. & COMM. CODE §3.420.

<sup>78</sup> 2004 WL 2366171, at \_\_\_\_.

<sup>79</sup> *Id.*

<sup>80</sup> 2004 WL 1966008, No. 02-0381 (Tex. Sept. 3, 2004).

<sup>81</sup> *Id.* at \_\_\_\_.

<sup>82</sup> For example, Chapter 33 does not apply to statutory fraud, *Davis v. Estridge*, 85 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied); actions against a nonsubscriber employer, *Kroger Co. v. Keng*, 23 S.W.3d 347, 348-53 (Tex. 2000); actions for UCC breach of warranty, *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 772-73 (Tex. App.—San Antonio 2002, no pet.); statutory antitrust claims, *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 310 (Tex. App.—Texarkana 2003, pet. pending); breach of contract, *CBI Na-Con, Inc. v. UOP, Inc.*, 961 S.W.2d 336, 340 (Tex. App.—Houston [1st Dist.] 1997, writ denied); partnership dispute alleging intentional acts, *Harris v. Archer*, 134 S.W.3d 411, 435 (Tex. App.—Amarillo 2004, pet. denied).

### **a. Jurisdiction**

The first requirement for an RTP is that “the court in which the action was filed could exercise jurisdiction over the person.”<sup>83</sup> The theory behind this restriction is that the RTP should be someone that the plaintiff could have made part of the case, but did not. In other words, the Balinese drug manufacturer or the Phillipine ferry boat operator, over whom the court could not exercise *in personam* jurisdiction, could not become an RTP.<sup>84</sup>

### **b. Could Have Been Sued/Liable for Damages**

The second and third requirements are that “the person could have been, but was not, sued by the claimant; and . . . the person is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant or defendants.”<sup>85</sup> This limitation arose from the long-established “no cause of action/no contribution” doctrine.

Under the “no cause of action/no contribution” doctrine, a defendant had no right of contribution against a person or entity against whom the plaintiff has no cause of action. That rule applied in cases of parental immunity,<sup>86</sup> employer immunity from suit per the worker’s compensation bar,<sup>87</sup> immunity for suit against plaintiff’s co-employee under comp,<sup>88</sup> individuals immune by statute,<sup>89</sup> governmental units barred by sovereign immunity,<sup>90</sup> individuals freed from liability by judgment,<sup>91</sup> and liability limited by contract.<sup>92</sup>

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<sup>83</sup> TEX. CIV. PRAC. & REM. CODE § 33.011(6)(A)(i)(eff. for actions before July 1, 2003).

<sup>84</sup> See *In re Arthur Andersen, LLP*, 121 S.W.3d 471, 478 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding)(finding this requirement satisfied when the RTPs generally appeared and submitted themselves to the court’s jurisdiction).

<sup>85</sup> TEX. CIV. PRAC. & REM. CODE § 33.011(6)(A)(ii), (iii).

<sup>86</sup> *Shoemaker v. Fogel, Ltd.*, 826 S.W.2d 933 (Tex. 1992).

<sup>87</sup> *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983).

<sup>88</sup> *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832 (Tex. 1986).

<sup>89</sup> *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547 (Tex. 1981).

<sup>90</sup> *City of Houston v. Selph*, 356 S.W.2d 850 (Tex. Civ. App.—Houston 1961, no writ).

<sup>91</sup> *Nagodoches County v. Fore*, 655 S.W.2d 347 (Tex. App.—Tyler 1983, no writ).

<sup>92</sup> *CBI Na-Con, Inc. v. UOP, Inc.*, 961 S.W.2d 336, 340-41 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

In this section, it appears that the legislators determined that it would not be fair to compare the responsibility of someone—or reduce the liability of a defendant because of someone—who could never be liable to the plaintiff.

### **c. Exemptions**

The 1995 statute expressly exempted from RTP status the plaintiff’s employer (if worker’s compensation is maintained), and a bankrupt person or entity.<sup>93</sup>

#### **(3). The 2003 Statute**

By design, the 2003 statute “eliminates the exceptions in the current proportionate responsibility statute that prevent juries from assigning fault to all responsible third parties.”<sup>94</sup> The 2003 statute provides that the “responsible third party” may now include “**any** person who is alleged to have caused or contributed to causing **in any way** the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or any combination of these.”<sup>95</sup>

Thus, the submission of the RTP can now be a veritable free-for-all, with submission of “bankrupt defendants, foreign defendants, unknown defendants, unidentified defendants, phantom vehicles, subcontractors whose names can’t be remembered,”<sup>96</sup> and so forth. The full impact of such an unrestrained submission on Texas tort law has yet to be determined.

### **a. Removal of All Restrictions**

The deliberate removal of all restrictions on the RTP allows the defendant to present for the jury’s consideration of responsibility persons who, under the law, could never be liable to the plaintiff. Specifically, because the prior restrictions were removed, it arguably appears that the following, non-exclusive list includes persons or entities that can now be submitted as an RTP:

- Foreign defendants with no contact with the forum (or even with the United States);
- Aliens;

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<sup>93</sup> TEX. CIV. PRAC. & REM. CODE § 33.011(6)(B).

<sup>94</sup> Statement by Rep. Nixon, House Civil Practices Committee, 2/26/03, Tape 1.

<sup>95</sup> TEX. CIV. PRAC. & REM. CODE § 33.011(6)(emphasis added).

<sup>96</sup> Testimony by Michael Gallagher, Senate State Affairs Committee, 4/10/03, Tape 2.

- Persons who have absconded or absented themselves from the jurisdiction of the court;
- The claimant's parents whom the claimant cannot sue because of parental immunity;
- A governmental unit which is immune from suit by the claimant;
- A person who is freed of liability against the claimant by contract;
- A person who is freed of liability to the claimant by judgment.

In addition to that list, the following are some even more surprising RTPs.

### **b. Employers**

Texas law has long forbidden the comparison of the conduct of the plaintiff's employer with the conduct of the defendant.<sup>97</sup> The philosophy behind that rule is that since the plaintiff is barred from suing his employer under the no-fault workers' compensation system, it would be inequitable for the defendant to try to shift the burden of loss to the employer.<sup>98</sup>

By removing the restriction in the 1995 statute, the 2003 statute now permits immune employers to be submitted as an RTP and to be used to reduce a defendants' thresholds for joint and several liability. As a trade-off for this unusual submission, the legislators provided that the worker's compensation carrier's subrogated lien will be reduced in accordance with the percentage of fault attributed by the trier of fact to the employer.<sup>99</sup>

### **c. Bankrupt Entities**

The 2003 statute also removed the restriction on bringing a bankrupt entity in as a RTP. This would appear to permit a bankrupt entity to be added as a RTP. Although the automatic stay in bankruptcy prevents actions against the debtor in bankruptcy,<sup>100</sup> inclusion of the bankrupt as a RTP does not appear to violate the stay. First, the bankrupt entity is not

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<sup>97</sup> *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983).

<sup>98</sup> *See id.* at 562.

<sup>99</sup> TEX.. LABOR CODE §417.001(b). This provision was added by HB 4.

<sup>100</sup> CITE

required to be formally “joined”—just “designated.”<sup>101</sup> Second, the statute provides that the inclusion as a RTP does not impose liability on the party and cannot be used in any other proceeding to impose liability on the party.<sup>102</sup> Thus, it would appear that there is no longer an applicable restriction that would prevent the designation of a bankrupt person or entity as a RTP.

**d. John and Jane Does**

Perhaps the most shocking part of the new legislation is the addition of an “unknown person,” denominated as “Jane Doe” or “John Doe,” as an RTP.<sup>103</sup> The theory is that the unknown person should be submitted so long as the defendant presents some evidence of the unknown person’s existence.<sup>104</sup>

A heated debate arose at the hearings about how much evidence was enough to submit an issue as to the percentage of responsibility of the unknown person. Representative Mabry inquired about the “white car doctrine”—where the defendant states that a white car ran him off the road.<sup>105</sup> Rep. Mabry asked whether that was sufficient evidence that would allow the issue to be submitted.<sup>106</sup> Rep. Gattis replied that it could be sufficient evidence even though the white car may never have existed.<sup>107</sup> He stated that “the jury gets to make that determination.”<sup>108</sup>

The statute now provides that a defendant can include as a RTP “an unknown person [who] committed a criminal act that was the cause of the loss or injury that is the subject of the lawsuit. . . .”<sup>109</sup> The court will grant the motion to designate the unknown person as a RTP if: (1) defendant has pleaded sufficient facts to show that there is a “reasonable probability” that the act was criminal; (2) the defendant has stated in its answer the identifying

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<sup>101</sup> TEX. CIV. PRAC. & REM. CODE §33.004.

<sup>102</sup> *Id.* at §

<sup>103</sup> TEX. CIV. PRAC. & REM. CODE §33.004(k).

<sup>104</sup> *Id.* at §33.004(j).

<sup>105</sup> Discussion between Rep. Gattis and Rep. Mabry, House Floor Debate, 3/27/03, Tape 60, Side B.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* To which, Rep. Mabry replied, “So you trust the jury’s determination and discretion in that situation, but you don’t in others, such as awarding damages, isn’t that right?” *Id.*

<sup>109</sup> TEX. CIV. PRAC. & REM. CODE § 33.004(j).

characteristics of the unknown person; and (3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.<sup>110</sup>

This part of the statute is almost more amazing for what it does not say as for what it says. For example, there is no requirement that the crime be a felony. There is no requirement that the unknown person ever be charged with the crime. There is no requirement that the defendant prove the crime beyond a reasonable doubt. There is no requirement that the unknown person ever be made to appear to answer for the crime. There is no requirement, as there is elsewhere in the statute, that the defendant prove criminal intent.<sup>111</sup> In short, this part of the statute looks to be a fertile area for future litigation.

### **C. Joinder**

The 2003 statute also removed the restrictions regarding joinder. Those differences are set forth below.

#### **(1). The 1995 Statute**

The RTP section of the 1995 statute was entitled “Joinder of Responsible Third Parties.”<sup>112</sup> Under the statute, a RTP was joined by filing a third party petition for that purpose, just as a defendant would join a third party prior to the act.<sup>113</sup> One court held that where the requirements were met, it was an abuse of discretion not to join the RTP.<sup>114</sup>

#### **(2). The 2003 Statute**

The 2003 statute repealed the joinder requirements, even changing the title of the section to “Designation of Responsible Third Party.”<sup>115</sup> Under the 2003 statute, a party may

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<sup>110</sup> *Id.*

<sup>111</sup> *Compare* § 33.004(j) *with* §33.013(b)(2).

<sup>112</sup> TEX. CIV. PRAC. & REM. CODE §33.004 (eff. for actions filed before July 1, 2003).

<sup>113</sup> *Id.* at §33.004(a), (d).

<sup>114</sup> *In re Arthur Andersen, LLP*, 121 S.W.3d 471, 482 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

<sup>115</sup> TEX. CIV. PRAC. & REM. CODE §33,004 (eff. for actions filed after July 1, 2003).

assure submission of a RTP merely by timely “designation.”<sup>116</sup> This designation is accomplished by filing a “motion to designate.”<sup>117</sup>

If an objection to the designation is “timely filed,”<sup>118</sup> the court “shall grant” the designation unless the objecting party establishes: (1) the defendant did not plead sufficient facts; and (2) after having been given leave to replead, the defendant still did not plead sufficient facts to satisfy “the pleading requirements of the Texas Rules of Civil Procedure.”<sup>119</sup>

Two things should be noted here. First, the statute places the burden on the plaintiff to prove that the defendant did not plead sufficient facts; there is no corresponding burden on the defendant to prove its right to the submission. Second, although the statute requires that the defendant plead sufficient facts to satisfy the “pleading requirements of the Texas Rules of Civil Procedure,” that is not a high threshold, in most cases, because Texas requires only “notice pleading.”<sup>120</sup>

#### **D. Limitations**

The 1995 statute also erected a detailed limitations scheme, which the 2003 statute subsequently took down.

##### **(1). The 1995 Statute**

Under the first RTP statute, if limitations have not expired, a defendant could join a RTP by filing a third party petition. If limitations have expired, a defendant may only join a RTP by third party claim filed no later than 30 days after the defendant’s answer date.<sup>121</sup>

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<sup>116</sup> *Id.* at §33.004(a).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at §33.004(g). The objection must be filed on or before the 15th day after the motion is received. *Id.* at §33.004(f).

<sup>119</sup> *Id.*

<sup>120</sup> See TEX. R. CIV. P. 47; see also *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex.2000)(“A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.”).

<sup>121</sup> TEX. CIV. PRAC. & REM. CODE §33.004(d)(eff. for actions filed before July 1, 2003).

The statute also creates a unique “grandfather clause”: if the defendant brings into the case a RTP after limitations, the claimant may also sue that party, without regard to limitations, if the claimant seeks to join the party within 60 days after the third party claim is filed.<sup>122</sup>

## (2). The 2003 Statute

The sections dealing with limitations were repealed in the 2003 statute. Instead, under the 2003 statute, the designation is timely if the motion is filed no later than 60 days before trial, unless leave of court is granted to *shorten* the time.<sup>123</sup>

One must designate “Jane Doe” or “John Doe”—the phantom defendant—no later than 60 days after the defendant’s original answer.<sup>124</sup>

If a person is designated as a RTP, the claimant can join that person, without being subject to a limitations defense, so long as the claimant brings suit against that RTP no later than 60 days after that person is designated a RTP.<sup>125</sup>

## E. Evidence

The 2003 statute includes a requirement that there be sufficient evidence to permit the designation of RTP. Specifically, the rules provide that after adequate time for discovery, a party may move to strike the designation of a RTP on grounds “that there is no evidence that the designated person is responsible for any portion of the claimant’s alleged injury or damage.”<sup>126</sup> The court “shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of material fact regarding the designated person’s responsibility for the claimant’s injury or damage.”<sup>127</sup>

Although this section of the 2003 statute sounds like a reasonable balance on some of the excesses elsewhere in the statute, in practice, “sufficient evidence” may be merely the

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<sup>122</sup> *Id.* at §33.004(e).

<sup>123</sup> TEX. CIV. PRAC. & REM. CODE § 33.004(a)(eff. for actions filed after July 1, 2003)..

<sup>124</sup> *Id.* at §33.004(j).

<sup>125</sup> *Id.* at §33.004(e). This provision could create some logistical problems. Because the defendant can designate the RTP up to 60 days before trial, and the plaintiff can bring suit against that person up to 60 days after designation, it appears that the RTP could be sued as a liable defendant on the eve of trial.

<sup>126</sup> *Id.* at §33.004(l).

<sup>127</sup> *Id.*

defendant (or its expert) “pointing the finger.”<sup>128</sup> The “white car doctrine,” previously discussed, comes to mind.<sup>129</sup>

#### **F. No Res Judicata**

The 2003 statute provides that a finding of responsibility against an RTP cannot “impose liability on the person” and “may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.”<sup>130</sup> In other words, no liability can be imposed on the “responsible” third party. Which raises the rhetorical question: how is the responsible third party “responsible” if it can never be held accountable for its actions? It is as if the RTP does not exist in the law, except (as we have seen) to the extent it allows the defendant to escape joint and several liability.

#### **G. Mandamus**

Two reported decisions have considered whether mandamus is available to challenge the trial court’s interlocutory decision to join, or not join, a RTP. In *In re Arthur Andersen, LLP*<sup>131</sup>, the Houston Fourteenth court of appeals held that the trial court abused its discretion by failing to join a number of financial institutions as RTPs in the wake of the Enron collapse.<sup>132</sup> The court of appeals also held that mandamus was available because the Arthur Andersen had no adequate remedy at law.<sup>133</sup> Although it appears from the opinion that the “no adequate remedy at law” decision was generated by the extraordinary facts surrounding the Enron collapse, the court held that there was no adequate remedy at law due to a “potential waste of resources, . . . combined with the possibility that Andersen may not be able to prosecute a separate suit against the third parties . . . .”<sup>134</sup>

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<sup>128</sup> See Testimony of Ron Franklin, Texans for Civil Justice, Senate State Affairs Committee, 4/10/03, Tape 1, pp. 24-28. (“I call this the finger pointing article. Because in this case, in order for a defendant who is sued to avoid or escape responsibility, all they have to do is point the finger . . .”).

<sup>129</sup> See *supra*, notes 105-108, and accompanying text.

<sup>130</sup> TEX. CIV. PRAC. & REM. CODE § 33.004(I).

<sup>131</sup> *In re Arthur Andersen, LLP*, 121 S.W.3d 471 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

<sup>132</sup> *Id.* at 485

<sup>133</sup> *Id.* at 486.

<sup>134</sup> *Id.*

In contrast, the Beaumont court of appeals in *In re Martin* denied mandamus where the trial court also failed to join a RTP.<sup>135</sup> The court distinguished *In re Arthur Andersen*, saying that, “[i]n certain circumstances, as in *Andersen*, an appeal may be an inadequate legal remedy, but we conclude the complaint in this case can be addressed on appeal and a new trial ordered if necessary.”<sup>136</sup>

## 9. Conclusion

The “responsible third party” was created out of whole cloth for the sole purpose of allowing a liable defendant to avoid joint and several liability. House Bill 4 removed the chains from this creation and, in doing so, unleashed a new form of jury submission in Texas tort cases. Let us hope that this unrestrained creation does not wreak havoc on the civil justice countryside.<sup>137</sup>

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<sup>135</sup> *In re Martin*, 147 S.W.3d 453 (Tex. App.—Beaumont 2004, orig. proceeding).

<sup>136</sup> *Id.* at 459.

<sup>137</sup> *Cf. Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 12 (Tex. 1991)(Doggett, J., dissenting)(“As in *The Night of the Living Dead*, an unthinking zombie is raised to prey on the living. When this court has resurrected enough of these monsters, the landscape of tort law will be bleak indeed, and let the victims beware.”).