

Contribution, Settlement Credits and Offers of Settlement

David W. Holman

**PERSONAL INJURY LAW CONFERENCE
SOUTH TEXAS COLLEGE OF LAW
May 4, 2006**

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CONTRIBUTION, SETTLEMENT CREDITS AND OFFERS OF SETTLEMENT

— DAVID W. HOLMAN

I. INTRODUCTION

In Texas, perhaps no other area of law has been subjected to as much change in the last fifteen years as rules regarding contribution and settlement credits. In that period, through “tort reform” efforts, rules regarding contribution and settlement credits have undergone three major statutory revisions. This past year, new rules regarding offers of settlement were announced. The purpose of this paper is to present an overview of the application of these rules.

II. CONTRIBUTION

Contribution is a means of allocating the burden of loss among defendants.¹ Contribution is a principle of tort law.² Historically, Texas has been a pioneer in development of contribution schemes, beginning with the first contribution statute, old TEX. REV. CIV. STAT. ANN. art. 2212, in 1917. That statute remains much in its original

¹ Contribution is thus distinguished from Indemnity—with which it is sometimes confused—because indemnity shifts the *entire burden of loss* from one party to another

² Although the rules that are discussed apply to Texas tort cases, there are other statutory contribution rules that apply under some federal and state statutes. *R.R. Street & Co., Inc. v. Pilgrim Enterprises, Inc.*, 81 S.W.3d 276, 286-87 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The Texas rights to contribution are now strictly statutory, but rights of contribution began as a creature of equity. See TEX. JUR. 3d *Contribution and Indemnification* § 3 (1997) (“[Contribution] proceeds on the acknowledged principles of equity and justice which require that one jointly bound by a common obligation to pay the debt of another who pays more than his ratable share shall be reimbursed by others jointly bound.”); *U.S. Fid. & Guar. Co. v. Century Indem. Co.*, 78 S.W.2d 737, 738 (Tex. Civ. App.—El Paso 1935, writ dismissed); *Brown & Root v. United States.*, 92 F. Supp. 257, 261 (D.C. Tex.1950) (applying Texas Law, court stated that origin of contribution “lies in the ancient doctrine of equity courts, now enforced at law, that those who are jointly liable will share the burden equally”); see also 18 C.J.S. *Contribution*, §§ 3, 6 (1990).

form today, as Chapter 32 of the Texas Civil Practice and Remedies Code.

In the modern era, there have been five different contribution schemes:

- The Comparative Negligence Statute, formerly TEX. REV. CIV. STAT. ANN. art. 2212a, codified in 1985 as Chapter 33 of the Texas Civil Practice and Remedies Code;
- The common law “Comparative Causation” scheme for products liability suits, developed by the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex.1984);
- The Comparative Responsibility Statute, enacted in 1987 as wholesale amendments to the Comparative Negligence Statute. See TEX. CIV. PRAC. & REM. CODE §§ 33.001, *et seq.*;
- The Proportionate Responsibility Statute, enacted in 1995 as further amendments to Chapter 33 of the Texas Civil Practice and Remedies Code; and
- The 2003 Amendments to the Proportionate Responsibility Statute.

Both the original Comparative Negligence Statute and the *Duncan v. Cessna* “comparative causation” scheme only apply to actions filed *before* September 2, 1987 and will not be further considered here.

For ease of discussion, we will distinguish between Chapter 32 and Chapter 33, and then break Chapter 33 down to the 1987 statute, the 1995 statute, and the 2003 amendments.

A. Standard of Review

Questions concerning the proper application and interpretation of the contribution rules are matters of statutory construction that are reviewed de novo. See *AlliedSignal, Inc. v. Moran*, 2003 WL 22014805 at *2 (Tex. App.—Corpus Christi 2003, no pet. h.)(citing cases); see *In re Canales*, 52 S.W.3d 698, 701 (Tex.2001) (trial court has no discretion in the interpretation of a statute).

B. Which Scheme Applies?

To determine which scheme applies, it is necessary to first look at when the action was filed, and then to look to the theory of liability to be adjudged against the nonsettling tortfeasor.

1. Effective Date

- filed before September 1, 1995:

—1987’s Comparative Responsibility statute applies, Chapter 33 of the Texas Civil Practice and Remedies Code (eff. Sept. 2, 1987)

—Chapter 32 of the Texas Civil Practice and Remedies Code applies—this is 1917’s original contribution statute.

- filed after September 1, 1996:

—1995’s Proportionate Responsibility statute applies—Chapter 33 of Texas Civil Practice and Remedies Code

—Chapter 32 applies

- special problem: filed between September 1, 1995 and September 1, 1996:

look to when cause of action *accrued*

If *accrued* before September 1, 1995 but *filed* before September 1, 1996, then 1987’s Chapter 33 applies. If *accrued* after September 1, 1995, then 1995’s Chapter 33 applies.

- filed after July 1, 2003:

—2003 Amendments to Chapter 33 apply

—Chapter 32 applies.

2. Applicability

To determine whether Chapter 32 or Chapter 33 applies, it is necessary to determine the theory of liability adjudged against the nonsettling tortfeasor. *Stewart Title Guarantee Co. v. Sterling*, 822 S.W.2d 1, 5 (Tex. 1991).

Chapter 32 is a residual scheme that covers any tort not governed by another statute. TEX. CIV. PRAC. & REM. CODE § 32.001(b).

1987’s Chapter 33 applies to specifically listed torts: negligence, strict liability, product liability, UCC breach of warranty, and mixed products/negligence theories. The statute excluded certain listed torts, such as intentional torts, insurance code violations, and so forth

1995’s Chapter 33 and the 2003 amendments apply 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). The statute applies to product liability actions. *AlliedSignal, Inc. v. Moran*, 2003 WL 22014805 (Tex. App.—Corpus Christi 2003).

The 1995 statute expressly does not apply to actions to collect worker’s compensation benefits or actions against an employer for exemplary damages arising out of the death of an employee; a claim for exemplary damages; or a cause of action arising from the manufacture of methamphetamines. TEX. CIV. PRAC. & REM. CODE § 33.002(c).

Although the 1995 statute was a statute of exclusion, rather than exclusion, the statute does not cover all torts—since some torts do not permit comparative liability which leads to percentage findings. See *Davis v. Estridge*, 85 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied).

The following are instances in which courts have found that Chapter 33 does **not** apply:

- Statutory fraud. *See Davis v. Estridge*, 85 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied); *see also Texas Capital Securities, Inc. v. Sandefer*, 108 S.W.3d 923, 925-26 (Tex. App.—Texarkana 2003, pet. denied)(Chapter 33 does not apply where defendants held jointly liable for fraud); *but see JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 773 (Tex. App.—San Antonio 2002, no pet.)(holds in dicta that since fraud is “tort”, Chapter 33 applies);
- Action against nonsubscriber employer. *Kroger Co. v. Keng*, 23 S.W.3d 347, 348-353 (Tex. 2000);
- Actions brought under the competitive sports doctrine; but, holding does not include nonparticipants. *Moore v. Phi Delta Theta Co.*, 976 S.W.2d 738, 741 (Tex. App.—Houston [1 Dist.] 1998, pet. denied);
- UCC statutory conversion claims. *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104 (Tex. 2004);
- UCC breach of warranty claims. *JHC Ventures, L.P. v. Fast Trucking, Inc.*, 94 S.W.3d 762, 772-73 (Tex. App.—San Antonio 2002, no pet.);
- Although the court of appeals held that Chapter 33 did not apply to Dram Shop actions, the Texas Supreme Court disagreed, holding it did apply. *See F.F.P. Operating Partners, L.P. v. Duenez*, 2004 WL 1966008 (Tex. 2004); *see also Sewell v. Smith*, 858 S.W.2d 350, 356 (Tex.1993).
- 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 claim. *CBI Na-Con, Inc. v. UOP Inc.*, 961 S.W.2d 336, (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).
- Defendants stipulated to strict liability—held not entitled to comparative responsibility findings. *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 822-823 (Tex. App.—Houston [1st Dist.] 1999, pet. denied);
- In a product liability action, cannot submit negligence of plaintiff for failure to discover the defect; but, can submit other types of plaintiff negligence. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 592-594 (Tex. 1999).

Those torts that do not permit comparative liability will fall, as if by default, into Chapter 32.

3. Special Problems Of DTPA

DTPA cases were specifically excluded by the original 1987 statute. TEX. CIV. PRAC. & REM. CODE § 33.002(b)(2). In 1989, certain DTPA causes of action—those involving death, personal injury or property damage arising from an incident involving death or personal injury—were included in Chapter 33. TEX. CIV. PRAC. & REM. CODE § 33.002(b)(2) (eff. Sept. 1, 1989). Non-death and non-personal injury DTPA claims continued to be governed by Chapter 32. *See Schenck v. Ebby Halliday Real Estate, Inc.*, 803 S.W.2d 361, 370-71 (Tex. App.—Fort Worth 1990, no writ).

The 1995 statute specifically applies to all DTPA causes of action. TEX. CIV. PRAC. & REM. CODE § 33.002(h).

Further, the Texas Supreme Court suggested that Section 17.555 of the Texas Business and Commerce Code provides a statutory right to contribution and indemnity—as in the case of an innocent agent who passes on his employer’s misrepresentations. *Miller v. Keyser*, 90 S.W.3d 712 (Tex. 2002).

C. The Proportionate Responsibility Statute

The Proportionate Responsibility statute addresses when a plaintiff is barred from recovery, when a plaintiff's recovery is reduced, when a defendant is jointly and severally liable, when a defendant can obtain contribution from other defendants, what percentage of the judgment a defendant must pay, what credits (or reductions) a defendant may get for plaintiff's settlements with other persons, and how a multi-party tort case is to be submitted to a jury. The rules of joint and several liability, contribution and settlement credits will be discussed in detail in other sections. In this section, jury submission, plaintiff's bar rule and reduction of plaintiff's recovery based on plaintiff's own responsibility are considered.

1. Jury Submission

Where Chapter 33 applies, the statute mandates the manner of submission of "responsibility" to the jury. *See AlliedSignal, Inc. v. Moran*, 2003 WL 22014805 at *3 (Tex. App.—Corpus Christi 2003, no pet. h.)(recognizes mandatory submission requirement)(citing cases). The trier of fact "shall" determine the percentage of responsibility for the following:

- each claimant;
- each defendant;
- each settling person; and
- each responsible third party who has been designated under Section 33.004.

The submission of the "responsible third party" was a creation of the 1995 statute. As will be discussed later, the 2003 amendments changed the rule to allow responsible third parties to be "designated", rather than formally joined to the lawsuit. *Compare* former TEX. CIV. PRAC. & REM. CODE § 33.003(a)(4)(repealed eff. July 1, 2003)("each responsible third party who has been joined under Section 33.004).

Where the liability of individual parties is at issue, it is error to either group plaintiffs or group defendants in the submission. *See AlliedSignal, Inc. v. Moran*, 2003 WL 22014805 at *4 (Tex.

App.—Corpus Christi 2003, no pet. h.)(holding that submission of "seat and buckle" in a products case was error because it did not submit individual defendants); *Perez v. Weingarten Realty Investors*, 881 S.W.2d 490, 494 (Tex. App.—San Antonio 1994, writ denied) (finding appellant's proposed jury question grouping defendants together into single question contrary to Section 33.003). However, in a product liability action, where there is one defendant or where there is no dispute about liability between defendants, it is not error to submit the product, instead of individual defendants. *See Dico Tire, Inc. v. Cisneros*, 953 S.W.2d 776, 797 (Tex. App.—Corpus Christi 1997, pet. denied).

Although the submission in Chapter 33 is mandatory, the submission can be waived by failure to properly request the submission. *See Dico Tire, Inc. v. Cisneros*, 953 S.W.2d 776, 797 (Tex. App.—Corpus Christi 1997, pet. denied)(defendant waived submission of the settling person by failing to object to the question and by failure to present evidence that party was settling person); *Lyman D. Robinson Family Ltd. Partnership v. McWilliams & Thompson, PLLC*, 143 S.W.3d 518, 521-22 (Tex. App.—Dallas 2004)(even though pleaded, waived by failure to request).

Moreover, submission is not required if not supported by the pleadings and evidence. *Rehabilitation Facility at Austin, Inc. v. Cooper*, 962 S.W.2d 151, 154 (Tex. App.—Austin 1998, no pet.)(submission of settling person not required); *see also Kroger Co. v. Betancourt*, 996 S.W.2d 353 (Tex. App.—Houston [14th Dist.], 1999, pet. denied).

A significant holding by the Supreme Court of Texas will make jury submission of proportionate responsibility more difficult. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 277 (Tex. 2005). In *Romero*, the Court held that where one of the theories upon which the proportionate responsibility question was based was found to be invalid, then the whole case needed to be reversed, even though the other liability finding was supported by the evidence. In the Court's view, the jury's percentage finding might well have been different, but for the invalid theory. This may require separate proportionate responsibility findings for each theory of liability.

2. Plaintiff Bar Rule

a. Chapter 32

By definition, Chapter 32 involves torts in which the plaintiff's contributory negligence is not a defense, such as fraud. Since there is no finding of plaintiff's fault, there is no bar to recovery.

b. 1987 Chapter 33

To overcome the pure comparative causation scheme adopted for products cases in *Duncan v. Cessna*, the 1987 legislature enacted a "60% bar" rule. In other words, in products cases, a plaintiff could not recover if it was 60% or more responsible for the injuries. TEX. CIV. PRAC. & REM. CODE § 33.001(b). The legislature retained the "51% bar" rule in negligence cases. TEX. CIV. PRAC. & REM. CODE § 33.001(a). A recent case questioned who is a "claimant" for the purposes of the 60% bar rule. See *Sanchez v. Brownsville Sports Center*, 51 S.W.3d 643, 656 (Tex. App.—Corpus Christi 2001, judgment vacated, reversed per settlement). In that case, the parents were each found 33 1/3 % responsible for causing the death of their child, while Honda was also found 33 1/3 % responsible. The trial court held that since the parents were derivative plaintiffs claiming damages that resulted from the death of their son, they were considered as one "claimant," under the statutory definition of "claimant" in Section 33.011(1); see also *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999)(for the purpose of settlement credit, the Court held that all of the family members seek damages for injury to their husband and father are considered one "claimant"). Thus, because the "claimant" was more than 60% responsible, the trial court held that the plaintiffs were barred from recovery. The court of appeals disagreed, and held that each parent was entitled to 50% of his or her damages. The Texas Supreme Court granted the petition for review but, after the case was argued, the case was settled, so the resolution of this issue will await another day.

A trial court cannot reform the judgment to correct the jury's comparative negligence findings. See *H.E. Butt Grocery Co. v. Pais*, 955 S.W.2d 384, 387 (Tex. App.—San Antonio 1997, no writ). Comparative negligence is uniquely a jury issue. See *Thompson v. City of Corsicana*

Housing Authority, 57 S.W.3d 547, 554-555 (Tex. App.—Waco 2001, no pet.)(summary judgment rarely appropriate on comparative responsibility issues); *Ramirez v. Fifth Club, Inc.*, 144 S.W.3d 574, 589-90 (Tex. App.—Austin 2004)(court of appeals cannot substitute its judgment for the jury's finding of 55% responsibility); cf., *Becton Dickinson and Co. v. Usrey*, 57 S.W.3d 488, 496-498 (Tex. App.—Fort Worth 2001, no pet.)(comparative responsibility issues present individual issues that preclude a finding of predominance in class action).

One court reversed a summary judgment against the plaintiff on proximate cause, holding that the question of whether the plaintiff was responsible for her own injuries was a jury question. *Biaggi v. Patrizio Restaurant Inc.*, 2004 WL 1758600 (Tex. App.—Dallas 2004, no pet.).

c. 1995 Chapter 33

The 1995 legislation enacted a 51% bar rule for all cases. TEX. CIV. PRAC. & REM. CODE § 33.001 (unchanged by 2003 amendments). Note that for this to make sense, a separate comparative issue should be submitted for each plaintiff.

EXAMPLE 1:

Jury finds P 51% responsible, D1 47% responsible, and D2 4% responsible, and finds \$100,000 damages. P cannot recover from either defendant.

One enterprising plaintiff argued that because, by definition, Chapter 33 does not apply to exemplary damages, so the fact that he was found 70% negligent cannot bar his recovery of exemplary damages. *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 661 (Tex. App.—Dallas 2002, pet. denied). The court held that because the plaintiff was barred from recovery of actual damages under Chapter 33, the plaintiff was not entitled to exemplary damages. *Id.*

The Texas Supreme Court has recognized that, in a product liability case, the plaintiff's negligence for failure to discover the product defect cannot be considered or used to bar the plaintiff's recovery. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 594 (Tex. 1999). However, other

conduct by the plaintiff can be considered and used to bar recovery. *Id.*

3. Plaintiff's Recovery Reduced

In those situations where the claimant is found less than 51% responsible, the statute provides that “the court shall reduce the amount of damages to be recovered by the claimant with respect to the cause of action by a percentage equal to the claimant’s percentage of responsibility.” TEX. CIV. PRAC. & REM. CODE § 33.012(a). The failure to properly reduce a plaintiff’s recovery by the plaintiff’s percentage of responsibility is not reversible error if the issue is not preserved for appeal. *See Roberts v. Burkett*, 802 S.W.2d 42, 45 (Tex. App.—Corpus Christi 1990, no writ).

EXAMPLE 2:

P sues D1 and D2 for negligence. P1 is found 40% responsible, D1 found 30% responsible, D2 found 30% responsible, and jury finds \$100,000 damages. Damages are reduced by claimant’s 40% to \$60,000. D1 and D2 are each liable to P for \$30,000.³

D. Joint and Several Liability

Contribution is allowed in Texas only among joint tortfeasors. *See Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex.1984). Under the doctrine of joint and several liability, a plaintiff can recover his entire judgment from one of several liable defendants who contributed to causing his injury. If a defendant pays the entire judgment, that defendant is permitted to seek contribution for any amounts the defendant paid in excess of its share of liability from the other liable defendants. This doctrine becomes important when one or more of the defendants is insolvent. The doctrine requires the liable defendants to bear the loss caused by insolvency

³ Unless the defendant is jointly and severally liable, the defendant is liable for the percentage of damages found by the trier of fact. *See* TEX. CIV. PRAC. & REM. CODE § 33.013(a).

and “furthers the fundamental policy of tort law to compensate those who are injured.” *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 429 (Tex. 1984).

This doctrine has been all but eliminated in most cases by “tort reform” legislation.

1. Under The Statute

a. Chapter 32

By statute, each liable defendant bears the risk of insolvency among co-defendants and must pay the judgment the insolvent defendants are unable to pay. TEX. CIV. PRAC. & REM. CODE § 32.003(b).

b. The 1987 Statute

The 1987 statute erected certain thresholds that must be met before a defendant would be considered jointly and severally liable. If the claimant was blameless, the defendant would have to be found *11% or more* liable to be jointly and severally liable; if the claimant was found at fault, the defendant would have to be found *21% or more* liable to be jointly and severally liable. TEX. CIV. PRAC. & REM. CODE § 33.013(b) and (c)(1). In negligence cases, the defendant’s percentage must be greater than the claimant’s percentage in order for the defendant to be jointly and severally liable. TEX. CIV. PRAC. & REM. CODE § 33.013(c)(1).

A toxic tort defendant was jointly and severally liable regardless of percentages. TEX. CIV. PRAC. & REM. CODE § 33.013(2)(3).

c. The 1995 Statute

The 1995 legislation specifically addressed joint and several liability. Under the Proportionate Responsibility statute, a defendant is not jointly and severally liable unless its percentage found by the jury is *51% or more*. TEX. CIV. PRAC. & REM. CODE § 33.013(b). Thus, only one defendant will be found jointly and severally liable. *See AlliedSignal, Inc. v. Moran*, 2003 WL 22014805 at *6 (Tex. App.—Corpus Christi 2003, no pet. h.) (“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”); see *Id.* at *7 (Bonner, J., concurring)(arguing that this turns product liability law “on its head.”). The percentages of individual Defendants cannot be combined to create joint and several liability. *Id.*

However, where a defendant is independently culpable and also vicariously liable for the actions of another defendant, the percentages of responsibility are added together, and the vicariously liable defendant is liable for the total. See *F.F.P. Operating Partners, L.P. v. Duenez*, 2004 WL 1966008, at *7 (Tex. 2004).

EXAMPLE 3:

P sues D1, D2 and D3 for negligence. D1 is found 60% responsible, D2 is found 20% responsible, D3 is found 20% responsible, and the jury finds \$100,000 damages. D1 is jointly and severally liable and must pay the entire \$100,000. D1 then has a right of contribution against D2 and D3 for their respective shares of responsibility.

EXAMPLE 4:

P sues D1, employer, and D2, employee. D1 is independently culpable and also vicariously liable for the acts or omissions of the employee. The jury finds D1 20% responsible, and D2 80% responsible. D1 pays 100% of the damages.

(1). Toxic Tort Exception

If the defendant is found liable for environmental hazard or toxic tort, the defendant is jointly and severally liable if its percentage is 15% or more.

(2). Penal Code Exception

In an unusual feature of the 1995 legislation, the statute imports certain Penal Code provisions into tort law. A defendant *is* jointly and severally liable, without regard to percentage of responsibility, if the defendant, “with a specific

intent to do harm to others” acts in concert with another defendant to engage in conduct described in the listed Penal Code provisions. TEX. CIV. PRAC. & REM. CODE § 33.002(b). The “intent to do harm” is defined and the jury cannot be made aware that the conduct is defined by the Penal Code. TEX. CIV. PRAC. & REM. CODE § 33.002(e)(g).

While the Penal Code provisions cover murder and assault and rape, the listed provisions also cover certain conduct that might arise in a commercial tort context, such as forgery, bribery, fraudulent destruction of a writing, securing execution of a document through deception and misapplication of fiduciary property. TEX. CIV. PRAC. & REM. CODE § 33.002(b) (listing Penal Code provisions).

EXAMPLE 5:

P1 sues D1, D2 and D3 for tortious interference. In addition to liability findings, jury finds that “with a specific intent to do harm to others,” D3 acted in concert with another person to engage in misapplication of P’s fiduciary property. D1 is found 40% responsible, D2 is found 40% responsible, D3 is found 20% responsible, and the jury finds \$100,000 damages. Because of the Penal Code exception, D3 is jointly and severally liable without regard to its percentage of responsibility. Thus, D3 must pay the entire \$100,000, and seek contribution from D1 and D2 based on their respective shares of responsibility.

d. The 2003 Amendments

The 2003 amendments kept the 51% or more requirement for joint and several liability, but made that barrier even harder for plaintiffs to obtain by lessening the procedural and substantive requirements for submission of a “responsible third party.” A nurse who is 5% responsible cannot be jointly and severally liable. *Morrell v.*

Finke, 2005 WL 2897551 (Tex. App.—Fort Worth 2005, pet. pending).

(1) Elimination of Toxic Tort Exception

The 2003 amendments eliminated the former toxic tort exception—which created joint and several liability if the defendant was found 15% or more responsible.

(2) Penal Code Exception Maintained

The Penal Code exception was carried forward, but shifted from its former location at section 33.002 to the structurally proper position at section 33.013(b)(2).

2. Under The Common Law

Certain common law theories—such as agency, alter ego, joint enterprise, partnership—impose joint and several liability. *See Truly v. Austin*, 744 S.W.2d 934, 937 (Tex.1988)(holding that a joint venturer is jointly and severally liable for joint-venture obligations). Courts have held that the “proportionate responsibility statute did not do away with the application of partnership and agency theories, nor did it replace equitable doctrines imposing liability on one corporation for the acts of another”*See North American Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 122 (Tex. App.—Beaumont 2001, pet. denied); Thus, a defendant can be held jointly and severally liable based on common law theories despite the fact that it is found less than 51% responsible by the jury. *Id.*, see also *Battaglia v. Alexander*, 93 S.W.3d 132, 144-45 (Tex. App.—Houston [14th Dist] 2002, pet. granted).

EXAMPLE 6:

P sues D1 and D2 for negligence. The jury finds that D1 and D2 were engaged in a joint enterprise. D1 is found 60% responsible, D2 is found 40% responsible, and the jury finds \$100,000 damages. Because of the finding of joint enterprise, and despite the fact that it was only found 40% responsible, D2 is jointly and severally liable for the entire \$100,000. If D2 pays

the \$100,000, D2 has a right of contribution against D1 for its share of responsibility.

E. “Responsible Third Party”

The 1995 legislation created a new party, known as the “responsible third party,” for the sole purpose of allowing a liable defendant to avoid joint and several liability. Any percentage that is assigned by the jury to the “responsible third party” is a percentage that cannot be assigned to the defendant. The 2003 amendments removed most of the procedural and substantive restrictions, so that the “responsible third party” can now even include unknown persons or entities.

1. Who Qualifies?

a. The 1995 Statute

Under the 1995 statute, a “responsible third party” is a party: (1) over whom the court could exercise *in personam* jurisdiction; (2) who could have been, but was not, sued by the claimant; and (3) who is, or may be, liable for the damages claimed against the defendants. § 33.011(6)(A). A “responsible third party” cannot be the claimant’s employer (if comp is maintained) or a bankrupt person or entity. TEX. CIV. PRAC. & REM. CODE § 33.011(6)(B). One litigant attempted to argue that because the State was immune and a “nonresponsible third party,” evidence concerning the State should have been inadmissible. *See Huckaby v. A.G.Perry & Son, Inc.*, 20 S.W.3d 194, 207 (Tex. App.—Texarkana 2000, pet. denied). The court held that the evidence was admissible on the issue of sole proximate cause. *Id.* A bank was not permitted to join the “thief” as a responsible third party because the statutory conversion claim was governed by the UCC, not the proportionate responsibility statute. *Southwest Bank v. Information Support Concepts, Inc.*, 2004 WL 2366171, at *1 (Tex. 2004).

The statute mandates submission of the properly joined “responsible third party” in the comparative liability submission. TEX. CIV. PRAC. & REM. CODE § 33.003.

b. The 2003 amendments.

The 2003 amendments abolished all the restrictions of the 1995 statute on who could be a “responsible third party.” Specifically, the 2003 amendments provide that a “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 by any combination of these.” TEX. CIV. PRAC. & REM. CODE § 33.011(6)(emphasis added).

Thus, under the 2003 amendments, the following persons may qualify as “responsible third parties” to be submitted to the jury:

- Persons not susceptible to personal jurisdiction of the trial court. The prior restriction on those over whom the court could exercise in personam jurisdiction was repealed;
- Persons immune from suit who could not be sued by the claimants. The prior restriction on those whom the claimant could sue was repealed;
- Persons who could not be held liable to the claimants. The prior restriction on those who could be held liable to the claimants was repealed;
- Debtors in bankruptcy. The prior restriction on including bankrupt entities as a responsible third party was repealed;⁴

⁴ Although the automatic stay in bankruptcy prevents actions against the debtor in bankruptcy, inclusion of the bankrupt as a responsible third party does not appear to violate that stay. The bankrupt is not required to be formally joined (just “designated”—see section 33.004) and the statute also provides that inclusion as a responsible third party does not impose liability on a party and cannot be used in any other proceeding to impose liability on that party. See TEX. CIV. PRAC. & REM. CODE § 33.004(I).

- Employers. The prior restriction on including claimant’s employer has been repealed. The legislature also provided that submission of the employer as a responsible third party does not diminish the employer’s worker’s compensation immunity from liability, but the worker’s compensation carrier’s subrogated lien will be reduced in accordance with the percentage of fault attributed to the employer. TEX. LAB. CODE § 417.001(b) (added by HB 4).
- Criminals. Since the amendments allow the responsible third party to be a party “in any way” responsible, the statute appears to permit submission of criminal conduct alongside tort or DTPA violations;
- Unknown criminals. The 2003 amendments specifically acknowledge that it is proper to include as a responsible third party “an unknown person [who] committed a criminal act that was the cause of the loss or injury that is the subject of the lawsuit . . .” TEX. CIV. PRAC. & REM. CODE § 33.004(j). The court shall grant the motion to designate the unknown person as a responsible third party 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 characteristics of the unknown person; and (3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure. *Id.* The rules allow the unknown person to be denominated “Jane Doe” or “John Doe” until the person’s identity is known. There is no requirement that the crime be a felony, that the unknown person ever be charged with the crime, or that the unknown person ever be made to appear to answer for its crime.

2. Joinder

a. The 1995 statute.

If limitations have not expired, a defendant may join a “responsible third party” by filing a third party petition. TEX. CIV. PRAC. & REM. CODE § 33.004(a). If limitations have expired, a defendant may only join a “responsible third party” by third party claim filed no later than 30 days after the defendant’s answer date. TEX. CIV. PRAC. & REM. CODE § 33.004(d). The statute also creates a unique *grandfather clause*: if the defendant brings into the case a “responsible third party” 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. TEX. CIV. PRAC. & REM. CODE § 33.004(e).

One court held that where the requirements were met, it was an abuse of discretion not to join the responsible third parties. See *In re Arthur Andersen LLP*, 121 S.W.3d 471, 482 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding)(granting mandamus); *but see In re Martin*, 147 S.W.3d 453 (Tex. App.—Beaumont 2004, orig. proceeding)(holds failure to join responsible third party was error, but not subject to mandamus because there was an adequate remedy at law). Another court held that even where the time limits had expired, the defendant could still submit the party as a “settling person.” *Omega Contracting, Inc. v. Torres*, 2005 WL 2403326, (Tex. App.—Fort Worth 2005, no pet.).

b. The 2003 Amendments.

The 2003 amendments repealed the joinder requirements. Under the 2003 amendments, a party may assure submission of a “responsible third party” merely by designating that person (or unknown person) in a motion for leave to designate filed on or before the 60th day before trial, unless the trial court for good causes shortens the time. TEX. CIV. PRAC. & REM. CODE § 33.004(a). If the responsible third party is so designated, a claimant can join that person even if an action against that person would be barred by limitations, so long as the claimant seeks to join

the person no later than 60 days after that person is designated. TEX. CIV. PRAC. & REM. CODE § 33.004(e).

If an objection to the motion to designate is “timely filed”, 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.” TEX. CIV. PRAC. & REM. CODE § 33.004(g).

Once the court grants the motion to designate a person as a “responsible third party,” that person is a “responsible third party” for all purposes, without any further requirements of joinder or otherwise. TEX. CIV. PRAC. & REM. CODE § 33.004(h).

A recent case analyzes these rules, determining whether the designation was timely, whether the criminal RTP designation was timely, and what constitutes sufficient pleading. *In re Unitec Elevator Services Co.*, 178 S.W.3d 53, 59 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding).

3. Evidence

The 2003 amendments include a requirement that there be sufficient evidence to permit the continued allegation of a responsible third party. Specifically, the rules provide that after adequate time for discovery, a party may move to strike the designation of a responsible third party on ground “that there is no evidence that the designated person is responsible for any portion of the claimant’s alleged injury or damage.” TEX. CIV. PRAC. & REM. CODE § 33.004(l). The court “shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person’s responsibility for the claimant’s injury or damage.” *Id.*

4. No Res Judicata

Not only does a responsible third party not need to be joined, but also any finding against a responsible third party can never be held against it. Specifically, the 2003 amendments provide that a finding of fault: “(1) does not by itself impose liability on the person; and (2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.” TEX. CIV. PRAC. & REM. CODE § 33.004(I).

EXAMPLE 7:

P sues D1 and D2 for products liability. D2 moves to designate “John Doe”, an unknown person, who it alleges trespassed on its property (a criminal act) and removed a safety guard on its product, as a responsible third party (RTP). The court grants the motion. D1 is found 45% responsible, D2 is found 45% responsible, RTP is found 10% responsible, and the jury finds \$100,000 damages. Neither D1 nor D2 are jointly and severally liable, but are only liable for their respective share.

EXAMPLE 8:

Same scenario as Example 7 except that D1 is found 0% responsible, D2 is found 10% responsible, and RTP is found 90% responsible. Because RTP is unknown, P can recover nothing from it. P can only recover 10% of its damages, or \$10,000 from D2.

F. Rules for Contribution

Having reviewed the legislative changes in the rules that impact on the availability of joint and several liability, it is safe to say that because a defendant will only rarely be held jointly and severally liable, the defendant will only rarely be forced to pay in excess of its share of

liability—and thus, will not be required to seek contribution. The rules that govern contribution have remained unchanged since 1987, but, as a practical matter, those rules remain largely unused.

1. Distinctions Between Chapter 32 and Chapter 33

Contribution is a method of allocating the burden of loss among liable tortfeasors. If a defendant pays more than its share of plaintiff’s recovery, the defendant is given a right of contribution to recover the amount paid in excess from another liable defendant.

a. Chapter 32

A defendant who pays a judgment has a right to recover payment from each co-defendant. TEX. CIV. PRAC. & REM. CODE § 32.002. A defendant who pays an insolvent defendant’s pro rata share of liability, has a right of contribution (for what it’s worth) against the insolvent defendant. TEX. CIV. PRAC. & REM. CODE § 32.003(c).

b. Chapter 33

The general rule is that a defendant may be liable to a claimant “only for the percentage of damages found by the trier of fact equal to the defendant’s percentage of responsibility with respect to the . . . harm for which damages are allowed.” TEX. CIV. PRAC. & REM. CODE § 33.013(a). The only way for a defendant to need a right to contribution is if the defendant is jointly and severally liable and pays more than its proportionate share of liability. A defendant who “pays a percentage of the damages . . . greater than his percentage of responsibility . . . has a right of contribution for the overpayment against each other liable defendant” to the extent that the other defendant has not paid the amount equal to his percentage of responsibility. *Id.* § 33.015(a).

2. The Contribution Defendant

The 1987 statute provides for the inclusion of a “Contribution Defendant”—that is, a defendant who has not been sued by the plaintiff, but who is

sued by the liable defendant for contribution. TEX. CIV. PRAC. & REM. CODE §33.016. The rights of contribution between the liable defendant and the contribution defendant were to be determined in a second comparative submission that did not include the plaintiff. *Id.* at §33.016(c).

With the creation of the “responsible third party” in 1995 and the liberalization of procedure and substantive requirements for the “responsible third party” in 2003, it is difficult to fathom a situation where inclusion of a Contribution Defendant would now be useful.

3. When Contribution Is Not Available

Although the statute provides a right of contribution, there are certain situations in which contribution is unavailable.

a. No Contribution For Exemplary Damages

Although early case law was unsettled about whether a defendant could be jointly and severally liable for another’s exemplary damages (through joint venture, successor liability, conspiracy, and so forth), statutory law now requires that an exemplary damage award “be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.” TEX. CIV. PRAC. & REM. CODE § 41.006. Thus, there can be no joint and several liability for exemplary damages.

b. No Post-Judgment Contribution

If one wants to assert a right of contribution, such must be done in the primary lawsuit. In 1997, the Texarkana court held that a defendant was not entitled to seek postjudgment contribution from a non-party in a second lawsuit after the original judgment. *See Casa Ford, Inc. v. Ford Motor Co.*, 951 S.W.2d 865, 873-76 (Tex. App.—Texarkana 1997, pet. denied). The court interpreted the language of Section 33.016(b), that provides that a defendant “may assert” a contribution claim during the primary action, to mean that the defendant **must** assert the contribution claim during the primary action (even

against a non-party), or the contribution right will be forever lost. *Id.* at 874; *see also Union City Body Co., Inc. v. Ramirez*, 911 S.W.2d 196, 207-08 (Tex. App.—San Antonio 1995, no writ) (Duncan, J., dissenting). This holding is illogical since the right of contribution does not accrue until a defendant pays a judgment in excess of its share of liability. *See Goose Creek Consol. Independent School Dist. of Chambers and Harris Counties, Texas v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 492 (Tex. App.—Texarkana 2002, pet. denied)(“[a]n action for indemnification or contribution does not accrue for limitations purposes until a plaintiff recovers damages or settles its suit against a defendant”).

One court, in dicta, disagreed with *Casa Ford* and found that an action for contribution could be brought after the primary action. *See In re Martin*, 147 S.W.3d 453 (Tex. App.—Beaumont 2004, orig. proceeding).

c. No Contribution Against A Settling Person

Chapter 33 specifically provides that there is no right of contribution against a settling person. TEX. CIV. PRAC. & REM. CODE § 33.015(d). Although the submission of the “settling person’s” responsibility is mandatory, there is no requirement that the settling person remain a party to the suit. *Wynn v. Cohan*, 864 S.W.2d 205, 207 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

However, one court held that section 33.015(d)’s prohibition does not apply if the person seeking contribution is not a “defendant.” *Southwestern Bell Telephone Co. v. General Cable Industries, Inc.*, 966 S.W.2d 166, 172-73 (Tex. App.—El Paso 1998, pet. denied)(settling person seeking contribution was non-suited by the plaintiff).

d. No Contribution For A Settlement

One defendant cannot settle the claims brought by the plaintiff and then seek contribution toward the settlement from co-defendants or co-tortfeasors. *Beech Aircraft Corp. v. Jenkins*, 739 S.W.2d 19, 22 (Tex. 1987); *Pearce v. Vince Hagan Co.*, 834

S.W.2d 108, 109 (Tex. App.—Fort Worth 1992, writ denied) (*Jinkins* rule applies after tort reform). This rule prohibits a defendant from taking an assignment of plaintiff’s claim against co-tortfeasors, or a plaintiff taking an assignment of defendant’s rights of contribution, or any similar method to preserve contribution rights after settlement. See *International Proteins Corp. v. Ralston-Purina Co.*, 744 S.W.2d 932, 934 (Tex. 1988). The *Jinkins* rule is not violated if two settling defendants agree contractually to later determine the allocation of responsibility between themselves for the monies paid to the plaintiff in settlement. *Southwestern Bell Tel. Co. v. General Cable Industries, Inc.*, 966 S.W.2d 166, 170-71 (Tex. App.—El Paso 1998, pet. denied). One court held that when a defendant entered into a “partial settlement,” in which it capped damages, that defendant, though a “settling person,” was also a “liable defendant” who could maintain a right of contribution against the nonsettling defendant. *Vela v. Garza*, 975 S.W.2d 801, 802 (Tex. App.—Corpus Christi 1998, no pet.).

The *Jinkins* rule does not require that the settling party ever be sued; if that party settled, it is not entitled to contribution from other tortfeasors. See *Filter Fab., Inc. v. Delauder*, 2 S.W.3d 614, 617 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

However, one court held that an insurer could pay a settlement (under Form F) and seek reimbursement from the insured and not run afoul of *Jinkins*, since the insurer was not a joint tortfeasor. See *National Cas. Co. v. Lane Exp., Inc.*, 998 S.W.2d 256, 265 (Tex. App.—Dallas 1999, pet. denied). The court also held that the insurer did not waive its right to reimbursement by paying the settlement since it did not sign the settlement, and was thus not bound to the settlement language. *Id.* at 262.

Another court held that one who pays an arbitration award is a “liable defendant”, and not a “settling person,” and thus, could seek contribution for the payment of the award. *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 833 (Tex. App.—Austin 2002, no pet.).

e. No Cause Of Action/No Contribution

It is well established that a defendant has no right of contribution against a person or entity against whom the plaintiff has no cause of action. See e.g. *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933 (Tex. 1992) (parents immune from suit by child); *Varela v. American Petrofina Co. of Texas, Inc.*, 658 S.W.2d 561 (Tex. 1983) (plaintiff’s employer); *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832 (Tex., 1986) (plaintiff’s co-employee); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547 (Tex. 1981) (individuals immune by statute); *City of Houston v. Selph*, 356 S.W.2d 850 (Tex. Civ. App.—Houston 1961, no writ) (governmental units barred by sovereign immunity); *Nacogdoches County v. Fore*, 655 S.W.2d 347 (Tex. App.—Tyler 1983, no writ) (individuals freed from liability by judgment).

This rule has been applied to prevent claims for contribution against one whose liability is contractually limited. *CBI Na-Con, Inc., v. UOP, Inc.*, 961 S.W.2d 336, 340-41 (Tex. App.—Houston [1st Dist.] 1997, writ denied) (contract limited recovery to reperformance of the negligent work).

f. No contribution for Contract.

One court held that contribution exists only between joint tortfeasors and is not available for contract claims. *CTTI Priesmeyer, Inc. v. K & O Ltd. Partnership*, 164 S.W.3d 675, 683 (Tex. App.—Austin 2005, no pet.).

III. SETTLEMENT CREDITS

The contribution statutes also reduced plaintiff’s recovery by providing the nonsettling defendant with a credit (or reduction) against recovery based on the plaintiff’s settlement with another. The 1987 statute (unchanged in 1995) provided a predictable settlement credit based on an election of either on the dollar amount of the settlements, or a sliding scale based on the amount of the judgment. However, the 2003 amendments eliminated the election and those credits in most cases and provides only a percentage credit. Settlement credits under both Chapter 32 and

Chapter 33 will be examined. Settlement credits are only available for tort claims. *CTTI Priesmeyer, Inc. v. K & O Ltd. Partnership*, 164 S.W.3d 675, 683 (Tex. App.—Austin 2005, no pet.).

A. Under Chapter 32

Although Chapter 32 does not address the effects of settlements on a plaintiff's recovery, judicial interpretation provided a rule that is "extremely advantageous" to the nonsettling tortfeasor. See *Cypress Creek Util. Serv. Co., Inc. v. Muller*, 640 S.W.2d 860, 863 (Tex. 1982). Under this rule, a nonsettling tortfeasor is given the right to make an election, *after the verdict*, about which credit it would like for the settlement by a co-tortfeasor: either (a) a pro rata credit based on the number of defendants; or (b) a pro tanto (or dollar amount) credit. See *Stewart Title*, 822 S.W.2d at 9; see also *Blackstock v. Dudley*, 12 S.W.3d 131, 136-137 (Tex. App.—Amarillo 1999, no pet.) (common law *Bradshaw* pro tanto settlement credit applies because 1987, non-personal injury DTPA claim). Although liability findings on the settling defendant are required in order to be entitled to a pro rata credit, no findings at all are required in order to be entitled to a dollar credit. *Stewart Title*, 822 S.W.2d at 9 n.10. However, one court held that a defendant who submits comparative responsibility and makes an election under Chapter 33 waives its right to a pro rata reduction under Chapter 32. *GTE Mobilnet of South Texas Ltd. Partnership v. Pascouet*, 61 S.W.3d 599, 619 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Thus, a nonsettling defendant could await the results of the jury verdict on damages and then choose the credit that gave it the greatest reduction of damages. This rule discouraged settlements.

B. Under Chapter 33

1. Before the 2003 Amendments

The 1995 legislation did not alter the effects of settlement in Chapter 33. Under the 1995 statute, the results were more predictable. A nonsettling

defendant has the right prior to submission to make an election of one of two possible credits for settlement: either (a) a dollar amount credit based on the total dollar amount of all settlements; or (b) a dollar amount credit (or "sliding scale") based upon listed percentages of the damages found. TEX. CIV. PRAC. & REM. CODE § 33.012(b). Since both dollar amounts can be predicted, the effects of settlement were more certain and less based on a roll of the dice, as with earlier schemes.

If no election is made or if there are conflicting elections, the "sliding scale" credit is given. TEX. CIV. PRAC. & REM. CODE § 33.014. The trial court is required to reduce plaintiff's recovery when there is a settlement. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 926 (Tex. 1998).

EXAMPLE 9:

P sues D1, D2 and D3 for negligence. P settles with D1 for \$30,000. D1 elects a dollar-for-dollar credit. D1 is found 40% responsible, D2 is found 40% responsible, D3 is found 20% responsible, and jury finds \$100,000 damages. Neither D1 nor D2 are jointly or severally liable, because the liability of the settling defendant, D3, has been submitted. A dollar for dollar credit of \$30,000 is applied. [see EXAMPLE 12 for the calculation of D1 and D2's proportionate share].

EXAMPLE 10:

Same scenario, except either D1 or D2 elect a sliding scale, or there are conflicting elections, or there is no election. In either case, the judge will apply the sliding scale. Because the amount of judgment was \$100,000, the amount of credit is

5 percent of \$100,000, or a \$5,000 credit.⁵

2. The 2003 Amendments

Both the old Comparative Negligence Statute and the *Duncan v. Cessna* “comparative causation” scheme provided settlement credits based on the percentage of liability assigned by the jury to the settling defendant. In order to encourage settlements, the 1987 statute was carefully designed to do away with that old “percentage credit” and provide more predictable settlement credits. See *McNair v. Owens-Corning Fiberglass Corp.*, 890 F.2d 753, 760 (5th Cir. 1989).

However, in the 2003 amendments, the legislature took a step back and eliminated both the dollar-for-dollar settlement credit and the so-called “sliding scale” credit. Instead, the 2003 amendments resurrect the old “percentage credit.” TEX. CIV. PRAC. & REM. CODE § 33.012(b). The statute provides that the court shall reduce the plaintiff’s recovery “by a percentage equal to each settling person’s percentage of responsibility.” *Id.* There is no election. There is no opportunity to obtain a dollar-for-dollar settlement credit.

EXAMPLE 11:

P sues D1, D2 and D3 for negligence. P settles with D1 for \$30,000. D1 is found 40% responsible, D2 is found 40% responsible, D3 is found 20% responsible, and jury finds \$100,000 damages. Neither D1 nor D2 are jointly or severally liable, because the liability of the settling defendant, D3, has been submitted. Because the jury found 20% responsibility on the

settling defendant, D3, the settlement credit is now \$20,000. [see EXAMPLE 12 for the calculation of D1 and D2’s proportionate share].

The legislature provided a different settlement scheme for medical malpractice cases. In a “health care liability claim” brought under Chapter 74 (the new Medical Liability Chapter that replaces Tex. Rev. Civ. Stat. Ann. art. 4590i), the defendant is permitted an election of either: (1) the dollar amount of all settlements; or (2) a percentage credit. TEX. CIV. PRAC. & REM. CODE § 33.012(c). As with the 1987 statute, if there is no election or conflicting elections, all defendants are considered to have elected the dollar-for-dollar credit. *Id.* at § 33.012(d).⁶

C. Availability of Settlement Credits

1. “Claimant”

a. The 1987 and 1995 statutes.

One of the most litigated problems caused by the definition of “claimant” in the 1987 and 1995 contribution statutes is how to provide settlement credits where there are multiple claimants based on the same injury. The Texas Supreme Court addressed this matter directly in 1999. See *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112 (Tex. 1999). In that case, the Court held that all of the family members who seek damages for injury to their husband and father are considered one “claimant” for the purpose of the statute. See also *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 96-97 (Tex. App.—Houston [1 Dist.] 1998, pet. denied) (“claimant” includes both plaintiffs, so all monies paid in settlement to both plaintiffs should be credited against total damages); *Brown & Root Inc. v. Shelton*, 2003 WL 21771917, at *12 (Tex. App.—Tyler 2003)(husband and wife one

⁵ The amount (and percentage) of the sliding scale credit increases as the amount of the judgment increases. For example, if the judgment were \$1,000,000, the sliding scale settlement credit would be \$145,000, even if the actual dollar amount of the settlement were \$30,000. See prior TEX. CIV. PRAC. & REM. CODE § 33.012(b)(amended eff. July 1, 2003).

⁶ In its haste to pass this legislation, the legislature enacted this 33.012(d) without regard to the fact that there was already another 33.012(d). The latter statute provides that reduction in recovery or settlement credits do not apply to recovery of worker’s compensation benefits. Both 33.012(d)s currently exist on the books.

“claimant” for purposes of settlement credit). With that construction, “the total of all damages to be recovered by the family must be reduced by the total of all settlements received by the family.” Then, “the remaining damages should be allocated among the parties seeking recovery based on each party’s percentage of the total verdict awarded to the claimant by the jury.” *Drilex*, 1 S.W.3d at 9; see also *Serv-Air, Inc. v. Profitt*, 18 S.W.3d 652, 664-65 (Tex. App.—San Antonio 1999, pet. dismissed by agr.)(settlement with all family members, even parents who were not joined, considered together for settlement credit).

The Court recognized that under its interpretation, some plaintiffs “may recover more than the amount awarded by the jury, and some plaintiffs’ awards will be reduced by settlement amounts paid to other plaintiffs,” but the Court felt that those “harsh” results were mandated by the Legislature. *Drilex*, 1 S.W.3d at 10.

The Court wrestled with this problem again in a creative, but ultimately unsuccessful, attempt to deny the nonsettling defendant settlement credit. See *Utts v. Short*, 81 S.W.3d 831 (Tex. 2002). In that case, the plaintiff attorney arranged for one defendant to settle and pay all of its money (\$200,000) to one of the wrongful death plaintiffs, then to settle with the remaining plaintiffs for \$10 each. That wrongful death plaintiff received \$50,000, gratuitously distributed \$10,000 each to the other plaintiffs, and left the rest in a fund for litigation expenses. Then, that wrongful death plaintiff, who had received the bulk of the money, nonsuited her claim against the nonsettling defendant.

Despite the fact that that plaintiff was no longer in the suit, the nonsettling defendant attempted to claim the full settlement for all the monies paid by the settling defendant. The trial court held that the nonsettling defendant was only entitled to a \$40 credit, based on the \$40 in settlements with the plaintiffs who remained in the suit. The Supreme Court, in its second opinion on rehearing, held that to avoid the settlement credit, the plaintiffs were required on remand to rebut the presumption that they were benefitted by the settlement. In a related case, the Texarkana court

held that the defendants must show more than mere allegation of a sham in order to pierce the attorney-client and work product privilege to determine motivations behind a settlement. *In re Lux*, 52 S.W.3d 369, 372-73 (Tex. App.—Texarkana 2001, orig. proceeding).

However, not all multiple claimants are grouped together as one “claimant” for credit purposes. Where each claimant has an individual, rather than derivative, claim, the *Drilex* rules do not apply. *Sterling Trust Co. v. Adderley*, 119 S.W.3d 312, 324 (Tex. App.—Fort Worth 2003, pet. pending).

EXAMPLE 12:

Family members P1, P2 and P3 sue D1 and D2 for the wrongful death of their father. P1 settles with D1 for \$10,000, P2 settles with D1 for \$20,000, and P3 settles with D1 for \$30,000. D1 is nonsuited. D1 is found 20% responsible, D2 is found 80% responsible, and jury finds \$100,000 in damages, in various amounts for the individual Ps. All Ps are considered one “claimant,” so D2 is entitled to a lump sum settlement credit of \$60,000 against the total recovery of all Ps, regardless of the individual recoveries. The Ps may recover \$40,000 from D2, allocated based upon the individual P’s percentage of the verdict.

b. The 2003 Amendments

The 2003 amendments attempted to solve the problem discussed in *Drilex* and *Utts* by amending the definition of “claimant” to read as follows:

(1)“Claimant” means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an

action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, “claimant” includes:

(A) the person who was injured, was harmed, or died or whose property was damaged; and

(B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm or death of that person or for the damage to the property of that person.

2. “Settling Person”

In the determination of whether a defendant has a right to a settlement credit, the courts have considered what qualifies as a “settlement.” Tracking the language of the definition of a “settling person” in the statute, the Texas Supreme Court held “that ‘settlement,’ as used in the comparative-responsibility law, means money or anything of value paid or promised to a claimant in consideration of potential liability.” *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 319 (Tex.1994).

With this definition in mind, various transactions are **not** considered “settlements” so as to entitle the nonsettling defendant to a settlement credit:

- Defendant gave the minor plaintiff some money (perhaps \$10), some toys, some clothes, and a handwritten statement that described the accident. *See Pipgras v. Hart*, 832 S.W.2d 360, 367 (Tex. App.—Fort Worth 1992, writ denied). Because there was no release of liability, the court held there was no settlement. *Id.*;
- A settlement of uninsured or underinsured motorists coverage is not a settlement entitled to credit under the statute. *Bartley v. Guillot*, 990 S.W.2d 481, 482-483 (Tex. App.—Houston [14th Dist.] 1999, pet. denied);
- An acknowledgment of an existing debt and a nonsuit is not evidence of a settlement. *Foust v. Estate of Walters*, 21 S.W.3d 495, 502-03 (Tex. App.—San Antonio 2000, pet. denied);
- Payment of an arbitration award is not evidence of a settlement. *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 831-32 (Tex. App.—Austin 2002, pet. denied);
- A defendant cannot receive credit for settlement amounts representing punitive damages. *See Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998).

3. Partial Settlements

A nonsettling defendant is permitted a settlement credit for partial settlement. *Vela v. Garza*, 975 S.W.2d 801, 803 (Tex. App.—Corpus Christi 1998, no pet.) (partial settlement of \$13,000 paid with agreement to limit recoverable damages to \$13,050); *C&H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 319-20 (Tex. 1994) (vacated on rehearing by settlement) (partial settlement of \$3 million in exchange for abandonment of punitives and cap on actuals).

4. Hi-lo agreements.

Plaintiff and one defendant entered into hi-lo agreement before trial. *Cortez ex rel. Estate of Puentes v. HCCI-San Antonio, Inc.*, 131 S.W.3d 113, 122-23 (Tex. App.—San Antonio 2004). The non-settling defendant wanted credit for the settlement, but the plaintiff argued that no money was paid before trial. The court held that this was a settlement and the non-settling defendant was entitled to credit, despite the fact that no money was paid before trial.

5. Annuities

Although to be a settlement, there must be a payment or promise to pay money “or anything of monetary value” to a claimant (TEX. CIV. PRAC. & REM. CODE § 33.011(5)), the question has been raised on how to value a settlement based on future payments, such as an annuity. One court held that the value of an annuity, for the purposes of settlement credit, is based on the cost or current market value of the annuity. *Sisters of Charity of the Incarnate Word v. Dunsmoor*, 832 S.W.2d 112, 118 (Tex. App.—Austin 1992, writ denied).

6. Post-submission Settlements

The courts are unsettled about what to do with a post-trial settlement. One court held that a post-trial settlement released that part of the judgment, including prejudgment interest, represented by the percentage of liability on the settling party. *Bowers v. Firestone Tire & Rubber Co.*, 832 F.2d 64, 66 (5th Cir. 1987) (applying Texas law). One court held that a post-trial settlement is outside the scope of Chapter 33’s settlement credit scheme. *Knowlton v. U.S. Brass Corp.*, 864 S.W.2d 585, 598 (Tex. App.—Houston [1st Dist.] 1993) *aff’d in part, rev’d in part, sub nom Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644 (Tex. 1996). Other courts held that, in contrast to the *Jenkins* rule, a defendant who settles post-trial is entitled to seek contribution against co-defendants. *See Haring v. Bay Rock*, 773 S.W.2d 676 (Tex. App.—San Antonio 1989, no writ); *Getty Oil Corp. v. Duncan*, 721 S.W.2d 475 (Tex. App.—Corpus Christi 1986, writ ref’d n.r.e.); *but see Trussway v. Wetzel*, 928 S.W.2d 174 (Tex. App.—Beaumont 1996, no writ).

Most recently, the Texarkana court held that credit for a post-submission settlement is under section 33.013, instead of 33.012 or 33.014. *Texas Capital Securities, Inc. v. Sandefer*, 108 S.W.3d 923, 927 n.1 (Tex. App.—Texarkana 2003, pet. denied)(dicta).

7. Default Judgment

Default judgments must reflect a credit for settlement with another tortfeasor. *See Texas Cab Co. v. Giles*, 783 S.W.2d 695, 696-97 (Tex. App.—El Paso 1989, no writ).

8. Burden To Prove Credit

The nonsettling defendant has the burden to prove its right to a settlement credit. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998). The defendant meets this burden by placing the settlement agreement or “some evidence of the settlement amount” into evidence. *Id.* By placing the uncontested settlement amount in the record, albeit during trial or in post-trial motions, Mobil met its burden. *Id.* (noting that verbally placing the uncontested amount in the record during trial and then in opposition to judgment was enough). In one case in which the settlements, but not the amounts, were shown in the record, the court of appeals abated the appeal to allow the trial court to determine the dollar amount of the prior settlements—which the court of appeals then credited against the judgment. *See Marathon Corp. v. Pitzner*, 55 S.W.3d 114, 145 (Tex. App.—Corpus Christi 2001, no pet.).

Once the non-settling defendant proves that there has been a settlement of joint damages, the burden shifts to the plaintiff to show that the settlement was not of joint damages, but only of several damages. *See Buccaneer Homes of Alabama, Inc. v. Pelis*, 43 S.W.3d 586, 589 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (“Once Manufacturer showed that it was entitled to a credit for any settlement amount representing joint damages, it was appellees’ burden to offer evidence allocating the settlement between: (1) damages for which Manufacturer and Retailer were jointly liable, and (2) damages for which only Manufacturer was liable”).

Because the defendant cannot receive credit for settlement amounts representing punitive damages, the burden is on the plaintiff to “tender a valid settlement agreement allocating between actual and punitive damages to the trial court before judgment.” *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 928 (Tex. 1998). If the plaintiff

fails to prove the allocation, the defendant is entitled to a credit for the entire settlement amount. *Id.*; *Sanchez v. Mica Corp.*, 107 S.W.3d 13, 21 (Tex. App.—San Antonio 2002, pet. granted).

The plaintiff also bears the burden to prove the proper allocations between plaintiffs. For example, in one case, the court held that the children failed to prove allocations in a settlement between: (1) damages for which their parents and the nonsettling defendant were jointly liable and (2) damages for which only their parents are liable. *Cohen v. Arthur Andersen, L.L.P.*, 106 S.W.3d 304, 310 (Tex. App.—Houston [1st Dist.] 2003, no pet. h.). Because the settlement agreement did not make such allocations, the nonsettling defendant was entitled to a credit for the entire settlement amount. *Id.*

A defendant can challenge as a sham the plaintiff's allocations—either between actuals and punitives, or between plaintiffs—either pre- or post-verdict. *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 310-11 (Tex. App.—Texarkana 2003, pet. pending) (citing *Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002)). “Once the nonsettling defendant presents evidence of a sham, the trial court must presume the entire settlement credit applies unless the plaintiff presents evidence to overcome this presumption.” *Sanchez v. Mica Corp.*, 107 S.W.3d 13, 22 (Tex. App.—San Antonio 2002, pet. granted). The trial court's determination about whether the transaction is or is not a sham is reviewed for an abuse of discretion. *Id.* at 24 (upheld unless there is no evidence of a sham transaction).

9. Right To Discovery of Settlement

To determine the proper amount of settlement credit, the nonsettling defendant is allowed either pre- or post-verdict discovery. *Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002); *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 310-11 (Tex. App.—Texarkana 2003, pet. pending); *In re Frank A. Smith Sales, Inc.*, 32 S.W.3d 871, 873 (Tex. App.—Corpus Christi 2000, orig. proceeding)(writ of mandamus issued to require production of settlement agreement so that the

settlement credit can be determined). However, where the nonsettling defendant made no effort to take advantage of discovery or test the allocations, the matter is waived. *Coca-Cola Co.*, 111 S.W.3d at 311.

10. Right To Make Election

The 1987 and 1995 versions of Chapter 33 provide that any defendant can make an election as to which settlement credit should be applied, by filing a written election before the issues are submitted to the trier of fact. TEX. CIV. PRAC. & REM. CODE § 33.014 (not effective for actions filed after July 1, 2003). However, a nonsettling defendant is not bound by an election made by a defendant who is nonsuited prior to submission of the case to the jury. *Fuller-Austin Insulation Co., Inc. v. Bilder*, 960 S.W.2d 914, 922 (Tex. App.—Beaumont 1998, writ granted); *see also University Preparatory School v. Huitt*, 941 S.W.2d 177, 182 (Tex. App.—Corpus Christi 1996, writ denied).

Third party defendants are entitled to claim a credit for a settlement between the third party plaintiff and the plaintiff, despite the fact that the third party defendant had not been sued by the plaintiffs. *Vela v. Garza*, 975 S.W.2d 801, 803 (Tex. App.—Corpus Christi 1998, no pet.).

In one case, the non-settling defendant made a written election for a dollar-for-dollar credit, then claimed it had changed the election verbally before submission to the jury. *See Marathon Corp. v. Pitzner ex rel. Pitzner*, 55 S.W.3d 114, 145 (Tex. App.—Corpus Christi 2001, no pet.). The court held that the verbal “election” (there is some doubt there even was one) was of no effect, since the statute requires a written election. *Id.*

Of course, except in health care liability claims, these rules will no longer apply, since the 2003 amendments have eliminated the written election in favor of a single percentage settlement credit. *See* TEX. CIV. PRAC. & REM. CODE § 33.012(b).

11. Waiver

A settlement credit can be waived by failure to request it in the trial court. *First Financial Dev. Corp. v. Hughston*, 797 S.W.2d 286, 294 (Tex. App.—Corpus Christi 1990, writ denied); *Harmon v. 1401 Elm Street Condominium Ass’n*, 139 S.W.3d 411, 417 (Tex. App.—Dallas 2004)(“Without a motion to modify or a motion for a new trial, Harmon failed to preserve this issue for our review.”). A settlement credit can also be waived by failure to prove up the settlement. *See Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520, 522 (Tex. App.—Beaumont, 1996, writ denied).

12. Standard of Review

There is a difference of opinion as to the proper standard of review of the application of a settlement credit. One line of cases holds that the proper application of a settlement credit is reviewed under a de novo standard. *See Brown & Root Inc. v. Shelton*, 2003 WL 21771917 *10 (Tex. App.—Tyler 2003, no pet. h.); *see also Sugar Land Props., Inc. v. Becnel*, 26 S.W.3d 113, 119 (Tex.App.—Houston [1st Dist.] 2000, no pet.). Another line of cases holds that a “trial court’s determination of the existence of, or the amount of, a settlement credit is reviewed for an abuse of discretion.” *Texas Capital Securities, Inc. v. Sandefer*, 108 S.W.3d 923, 925 (Tex. App.—Texarkana 2003, pet. denied); *see also Goose Creek Consol. Indep. Sch. Dist. v. Jarrar's Plumbing, Inc.*, 74 S.W.3d 486, 504 (Tex. App.—Texarkana 2002, pet. denied).

13. The One Satisfaction Rule

In those cases in which a settlement credit is not available under the strict application of the statute, a settlement credit may yet be available under the common law “one satisfaction” rule. The one satisfaction rule prohibits a plaintiff from recovering twice for a single injury. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex.2000); *Buccaneer Homes of Alabama, Inc. v. Pelis*, 43 S.W.3d 586, 589 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The one satisfaction rule applies when multiple defendants commit the same act or when multiple defendants commit technically different acts that result in a single

injury. *Crown Life*, 22 S.W.3d at 390. “The nonsettling defendant is entitled to offset any liability for joint and several damages by the amount of common damages paid by the settling defendant, but not for any amount of separate or punitive damages paid by the settling defendant.” *Id.* at 391-92.

The amount of the credit is the total dollar amount of the settlement after the verdict. *Id.* at 392. The credit was deducted from the damages to which both the settling defendant and the nonsettling defendant were jointly liable. *Id.*; *see also Cohen v. Arthur Andersen, L.L.P.*, 106 S.W.3d 304, 308 (Tex. App.—Houston [1st Dist.] 2003, no pet.h.).

The defendant bears the burden to establish the applicability of the one satisfaction rule by making the court aware of the settlement; then, the burden shifts to the plaintiff to establish why the rule should not apply. *Oyster Creek Financial Corp. v. Richwood Investments II, Inc.*, 2004 WL 1794706, at *18 (Tex. App.—Houston [1st Dist.] 2004).

The one satisfaction rule does not apply to claims for breach of contract. *CTTI Priesmeyer, Inc. v. K & O Ltd. Partnership*, 164 S.W.3d 675, 683 (Tex. App.—Austin 2005, no pet.)

14. The Single Injury Rule

Defendants can be joint tortfeasors only if they contributed to cause a “single indivisible” injury to the plaintiff. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7-8 (Tex. 1991); *see also Reyna v. Safeway Managing General Agency for State and County Mutual Fire Insurance Company*, 27 S.W.3d 7, 20 (Tex. App.—San Antonio 2000, rev’d on other grounds, without opinion)(“If the injury is indivisible and was caused by both the settling and the nonsettling defendants, the nonsettling defendant is entitled to a settlement credit”).

If the defendants did not cause the *same* injury, but were each the cause of a separate, distinct injury, the defendants cannot be joint tortfeasors. *Id.* at 8; *see First Title Co. v. Garrett*, 860 S.W.2d 74, 78-79 (Tex. 1993). Under the latter rule, an

asbestos defendant cannot recover a credit for plaintiff's prior settlement of a medical malpractice claim. *Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520, 522 (Tex. App.—Beaumont 1997, writ denied). There, the Court said, “[a] non-settling defendant is only entitled to credit for money recovered from a settling defendant which compensates the plaintiff for damages which are equally applicable to both defendants.” *Id.*

15. Choice of Law

In a case in brought in Texas, Texas courts will apply the Texas settlement credit scheme. *Smith v. Cudd Pressure Control Inc.*, 126 S.W.3d 106, (Tex. App.—Houston [1st Dist.] 2003, pet. denied).(rejecting application of Louisiana's proportionate settlement credit to suit governed by Chapter 33).

D. Calculation of Settlement Credits

1. Credit Applied Before or After Prejudgment Interest?

There appears to be a difference of opinion as to whether the settlement credit is to be applied before or after calculation of prejudgment interest. The settled rule had been that the settlement credit is to be applied to the damages found by the jury *before* prejudgment interest is calculated. *Fuller-Austin Insulation Co., Inc. v. Bilder*, 960 S.W.2d 914, 923 (Tex. App.—Beaumont 1998, pet. dismissed); *Stewart Title Co. v. Sterling*, 822 S.W.2d at 9.

However, two cases in the medical malpractice arena have held that the settlement credit is to be applied *after* prejudgment interest is calculated. *Samples v. Graham*, 76 S.W.3d 615, 621 (Tex. App.—Corpus Christi, 2002, no pet.); *Battaglia v. Alexander*, 93 S.W.3d 132, 145-46 (Tex. App.—Houston [14th Dist.] 2002, pet. granted). That holding may be based on the unique statutory language of the medical malpractice statute.

2. Credit Applied Before Tort Claim Caps

In a suit against a governmental entity, the trial court should apply the settlement credit to the total damages and then apply the Tort Claims Act limit on liability. *Edinburg Hosp. Authority v. Trevino*, 941 S.W.2d 76, 81-82 (Tex. 1997) (defendant wanted the court to apply \$250,000 limit first, then also give it a credit).

3. Credit Applied To Combined Med-Mal Caps

There is an interesting relationship between the settlement credit and the medical malpractice cap on damages for wrongful deaths. In 1993, plaintiffs settled a malpractice action against all but one defendant for \$1,275,000. *See Wynn v. Cohan*, 864 S.W.2d 205, 206 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Since the med-mal cap was then \$1,200,000, the remaining defendant claimed a dollar-for-dollar credit and moved for summary judgment on the basis that the credit exceeded his potential liability. *Id.* Summary judgment was granted.

In reversing the summary judgment, the court held that the settlement credit should be taken from the combined liability (or combined caps) of all defendants, settling and nonsettling. The court held, “the non-settling defendant may only claim a credit based on the damages for which all defendants are jointly liable.” *Id.* at 207. Thus, settling defendants are included for the purpose of determining the combined statutory liability of all defendants under TEX. REV. CIV. STAT. ANN. art. 4590i § 11.02 (now TEX. CIV. PRAC. & REM. CODE §§ 74.001, *et seq.*).

4. If Settlement Credit, No Proportionate Reduction For Jointly and Severally Liable Defendant.

If a defendant, who is found more than 50% liable recovers a settlement credit, that defendant cannot also recover a percentage reduction based on the jury finding against it. *Sugar Land Properties, Inc. v. Becnel*, 26 S.W.3d 113, 120 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (“The issue is whether a defendant whose responsibility is greater than 50 percent is jointly and severally liable for the amount remaining after that

defendant has received a dollar-for-dollar credit for all settlements. We hold that it is”).

5. Proportionate Share Taken From Total Damages Prior To Deduction For Settlement Credit

Last year, the Texas Supreme Court explained how to calculate the nonsettling defendant’s proportionate share when there is a credit for settlement. *Roberts v. Williamson*, 111 S.W.3d 113, 122-23 (Tex. 2003). First, the settlement is deducted from the total amount of damages found by the jury. That figure becomes the maximum figure to which the plaintiff is entitled to recover. *Id.* at 123. Second, the defendant’s proportionate share is multiplied times the total amount of damages found by the jury (not from the reduced amount). *Id.* If the defendant’s proportionate share does not exceed the maximum to which the plaintiff is entitled, then the defendant becomes liable for that amount. *Id.*

EXAMPLE 13 (1995 statute):

P sues D1, D2, and D3 for negligence. P settles with D1 for \$30,000. D2 files a written election for a dollar amount settlement credit. D2 joins a RTP. D1 is found 5% responsible, D2 is found 40% responsible, D3 is found 40% responsible, RTP is found 15% responsible and the jury finds \$100,000 in damages. First, the \$30,000 settlement credit is subtracted from the \$100,000, giving P a “maximum” recovery of \$70,000. Both D2 and D3’s proportionate share of responsibility (40%) is multiplied against the total damages found by the trier of fact (\$100,000), so that D2 and D3 are each liable for \$40,000.

EXAMPLE 14 (2003 amendments):

Same scenario as EXAMPLE 12 above. However, because there is no dollar amount credit, D2 and D3 are limited to a percentage credit. That amount (5% X \$100,000) yields a credit of \$5,000. Therefore, P’s “maximum” recovery is \$95,000. D2 and D3 are still liable for their proportionate share of the damages found by the jury, or \$40,000.

IV. OFFERS OF SETTLEMENT

A. Introduction

As part of the 2003 tort reform legislation, the legislature passed what is called the Offer of Settlement. That legislation has now been codified into both Chapter 42 of the Texas Civil Practice and Remedies Code and Rule 167 of the Texas Rules of Civil Procedure. It is unknown why the legislature wanted to both amend the Texas Civil Practice and Remedies Code and to have the Texas Supreme Court promulgate a rule on the very same topic. The subtle distinctions in the language between the Code and the Rule will no doubt lead to some lively interpretations. The purpose of this paper is to explain the application of the new statute in broad terms. For a more thoroughgoing analysis, please see Elaine A. Carlson, *The New Texas Offer of Settlement Practice*, *The Impact of House Bill 4*, State Bar of Texas CLE, January-February 2004 (hereafter “Carlson”).

B. Purpose of the Statute

The statute penalizes those who reject reasonable settlement offers and rewards those who make reasonable settlement offers. The purpose is to encourage reasonable settlements. The statute provides this system of penalties and rewards by shifting “litigation costs”—attorney’s fees, costs of court and the fees of two experts—from the party that unreasonably rejected the settlement offer to the party that made the reasonable offer. Whether a settlement offer is reasonable is based

on an objective criteria—that is, how close the offer came to the final judgment.

C. **Applicability**

1. **Effective Date**

Pursuant to HB 4, fee-shifting will apply to actions “filed on or after January 1, 2004.” *See* Carlson, at 1.

2. **Claims for Monetary Relief.**

By its terms, the statute only applies to claims for monetary relief. *See* TEX. CIV. PRAC. & REM. CODE § 42.002(a). Thus, settlements of suits for declaratory relief, injunctive relief, or other equitable relief are not affected.

3. **Claims Excluded**

The statute does not apply to the following claims:

- a class action;
- a shareholder’s derivative action;
- an action by or against a governmental unit;
- an action brought under the Family Code;
- an action to collect worker’s compensation benefits; or
- an action filed in justice of the peace court or small claims court.

See TEX. CIV. PRAC. & REM. CODE § 42.002(b); TEX. R. CIV. P. 167.1.

4. **Defendant’s Declaration**

Although the statute ostensibly applies to settlement offers made by both plaintiffs and defendants, giving both an equal shot at fee-shifting, the statute is not triggered “until a **defendant** files a declaration that the settlement

procedure allowed by this chapter is available in the action.” TEX. CIV. PRAC. & REM. CODE § 42.002(c)(emphasis added); TEX. R. CIV. P. 167.2(a). However, under the definition of defendant, a plaintiff could be a defendant if there is a cross-claim or counter claim against that plaintiff. TEX. CIV. PRAC. & REM. CODE § 42.001(3).

Defendant’s declaration triggers the right to make offers under the rule “to settle only those claims by and against that defendant.” TEX. R. CIV. P. 167.2(a). Thus, where there are multiple defendants, each defendant must separately trigger application of the rule.

Defendant’s declaration must be made no later than 45 days before the case is set “for conventional trial on the merits.” *Id.* However, for good cause shown, the trial court can modify the time limits for filing the declaration. *Id.* at 167.5(a).

5. **Other Offers**

Offers of settlement to which the statute does not apply are unaffected. The statute does not prevent, discourage, “limit or affect” the ability of any person to make or offer to settle any claim. *See* TEX. CIV. PRAC. & REM. CODE § 42.002(d). The rule expressly does not apply to “any offer made in a mediation or arbitration proceeding.” TEX. R. CIV. P. 167.7. Further, any offer not in conformity with the terms of the statute does not trigger fee-shifting. *Id.*; TEX. CIV. PRAC. & REM. CODE § 42.002(e).

D. **The Offer**

1. **Requirements**

To qualify for fee-shifting, a settlement offer must:

- be in writing;
- state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;

- identify the party or parties making the offer and the party or parties to whom the offer is made;
- state the terms by which all monetary claims—including the attorney’s fees, costs and interest to date—may be settled;
- state a deadline—no sooner than 14 days after the offer is served—by which the offer can be accepted; and
- be served on all parties to whom the offer is made.

TEX. CIV. PRAC. & REM. CODE § 42.003; TEX. R. CIV. P. 167.2(b).

2. Conditions

An offer may be subject to reasonable conditions. If the receiving party does not object, those conditions are deemed reasonable. If, however, an offer subject to a condition is rejected, that offer cannot form the basis for fee-shifting. TEX. R. CIV. P. 167.2(c).

3. Time Limits

To qualify for fee-shifting, an offer may not be made: (1) before a defendant’s declaration is filed; (2) within 60 days of the appearance in the case of the offeror or offeree, whichever is later; or within 14 days before the date set for trial, except that an offer can be made in response to another offer made within seven days. *See* TEX. R. CIV. P. 167.2(e). Thus, this rule provides certain “breathing room” to avoid gamesmanship. The defendant cannot trigger an offer right out of the gate, but must await at least two months to elapse before making an offer. This will allow the defendant time to learn the case rather than to rush forward with a premature offer. Neither will the defendant be permitted to make an offer for the first time on the courthouse steps in order to try to shift trial litigation costs.

4. Successive Offers

A party can make an offer after it rejected a prior offer. However, a rejected offer is subject to shifting of litigation costs only “if the offer is more favorable to the offeree than any prior offer.” TEX. R. CIV. P. 167.2(f). The plain reading of that statute means that the offers must get successively more favorable. If the offers get worse, the rule does not apply.

5. Withdrawal of Offer

An offer can be withdrawn in writing any time before it has been accepted. TEX. R. CIV. P. 167.3(a). Once withdrawn, the offer cannot be accepted. *Id.*

6. Acceptance of Offer

An offer can be accepted in writing by the deadline stated in the offer. TEX. R. CIV. P. 167.3(b). When the offer has been accepted, the offeror may file it with the court and move the court to enforce the settlement. *Id.* Note that up until the time of acceptance, the settlement offers and rejections are not filed with the court. *See* Carlson, at 17.

7. Rejection of Offer

Be careful of this one: “An offer that is not withdrawn or accepted is rejected.” TEX. R. CIV. P. 167.3(c). In other words, all the offeror need do is make the requisite offer. If the receiving party—or, in the words of the statute “offeree”—does nothing, that in itself triggers fee shifting. The receiving party can also formally reject the offer in writing by the deadline stated in the offer. *Id.*

E. The Trump of Joinder

An interesting procedural “trump” to the fee shifting rules occurs if the offeror joins another party or designates a responsible third party. If that happens, all prior offers can no longer be the basis for fee shifting if, within 15 days after service of the pleading, the offeree files an objection to the original offer. TEX. R. CIV. P. 167.3(d).

F. **Basis For Award Of “Litigation Costs”**

The basis for the award of litigation costs is if the judgment is “significantly less favorable” to the rejecting party than was the settlement offer. Since the settlement offer can be made by both the plaintiff and the defendant, the statutes provide the objective definition of what is a “significantly less favorable” judgment:

- For the plaintiff, his award is less than 80 percent of the rejected offer;
- For the defendant, the plaintiff’s award is more than 120 percent of the rejected offer.

TEX. CIV. PRAC. & REM. CODE § 42.004(b); TEX. R. CIV. P. 167.4(b). Professor Carlson raises some interesting analytical questions concerning what constitutes the judgment, and what happens when that judgment is modified by the trial court. Many of those questions will have to await resolution for another day. However, it is clear that if the plaintiff suffers a take nothing judgment, the fee shifting provisions of this statute do not come into play. *See* Carlson, at 24.⁷

G. **What Are “Litigation Costs”**

If the conditions are met—reasonable offer, rejection, significantly less favorable judgment—the court “must” award the offeror “litigation costs.” The elements of those “litigation costs” are addressed below.

1. **Court Costs**

Litigation costs includes “court costs.” While not defined by the statute, court costs should have the common meaning assigned to such costs in other rules. *See* TEX. R. CIV. P. 131.

One defendant argued that he was the “prevailing party” entitled to court costs because the

⁷ The defendant’s only recovery of fees is as an setoff against plaintiff’s recovery. *See* TEX. R. CIV. P. 167.4(g). If there is no recovery, there is no setoff, and no fee shifting.

plaintiff’s judgment was considerably less than the defendant’s pre-trial offer. *Nicholson v. Tashiro*, 140 S.W.3d 445, 448 (Tex. App.-Corpus Christi 2004). The court held that the definition of “prevailing party” is not based on the amount of money recovered, and since the defendant had stipulated to liability, and had also stipulated that the plaintiff was not liable, the plaintiff was entitled to his costs. *Id.*

2. **Fees for Two Experts**

Included as litigation costs are the “reasonable fees for not more than two testifying expert witnesses.” TEX. R. CIV. P. 167.4(c)(2).

3. **Attorney’s Fees**

Also included as litigation costs are “reasonable attorney’s fees”. TEX. R. CIV. P. 167.4(c). The rule prevents a “double dip” of recovery of attorney’s fees, by preventing fee shifting if the offeror is entitled to recover attorney’s fees under some other law. *Id.* at 167.4(e). Further, the party against whom the attorney’s fees are awarded may not recover back attorney’s fees under some other statute for the time from the rejection of the offer to the judgment. *Id.* at 167.4(f).

H. **Limits on Amount of Litigation Costs**

1. **Limited in Time**

The litigation costs—court costs, expert fees and attorney’s fees—are limited in time to those costs and fees incurred “from the time the offer was rejected to the time of judgment.” TEX. R. CIV. P. 167.4(a).

2. **Limited in Amount**

The amount of litigation costs cannot exceed the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages *minus* any statutory or contractual liens. TEX. R. CIV. P. 167.4(d).

3. **Limited in Remedy**

A defendant can only recover litigation costs as a setoff against the plaintiff's judgment against that defendant. TEX. R. CIV. P. 167.4(g).

4. Discovery into Reasonableness

Any party against whom litigation costs are awarded may be permitted by the trial court to conduct discovery into the reasonableness of the litigation costs requested. TEX. R. CIV. P. 167.5(b). However, if the court later determines the costs are reasonable, the court "must" order the discovering party to pay the fees and costs incurred by other parties in responding to such discovery. *Id.* The court must, on request, conduct a hearing on a request for litigation costs. *Id.* at 167.5(c).

5. Inadmissible

An offer is not admissible except in a proceeding to enforce the settlement or obtain litigation costs. "The provisions of this rule may not be made known to the jury by any means." TEX. R. CIV. P. 167.6.