DESIGNATING A RESPONSIBLE THIRD PARTY

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DESIGNATING A RESPONSIBLE THIRD PARTY

I. INTRODUCTION

Proportionate responsibility, or comparative responsibility as it is sometimes referred to, can be a difficult issue to grasp. In essence, the terms involve issues relating to the assessment of responsibility to those involved in a lawsuit. With the new legislative changes created by House Bill 4 this past summer, proportionate responsibility has undergone a tremendous transformation, which was designed to lead to a much more equitable apportionment of fault and thus hopefully eliminate the situations in which deep pocket defendants with little to no liability are imposed with joint and several liability.

The following paper will attempt to provide an outline of the statutory requirements of designating a responsible third party, pursuant to the newly drafted Civil Practices and Remedies Code Chapter 33. Of importance, is that under the new law, a responsible third party need no longer be joined in the suit, but rather, only designated as a possible culpable party. The result is that procedurally it has become much easier to inject a responsible third party into a lawsuit. Under the new law, a defendant can avoid suing and joining an unnamed party in a lawsuit by merely designating them as a responsible third party. Therefore, a defendant may decrease its proportion of responsibility without making another party liable. This notion is clearly outlined in TEX. CIV. PRAC. & REM. CODE §33.004(i), which states: “The filing or granting of a motion for leave to designate a person as a responsible third party or a finding of fault against the person:

(i) does not by itself impose liability of the person; and
(ii) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability of the person.”

II. OLD LAW

Chapter 33 (2003), which applies to actions filed on or after July 1, 2003, has made a number of changes to the proportionate responsibility protocol. These changes, for the most part, do not appear to substantially impact the form of the basic proportionate responsibility questions submitted to the jury in cases where Chapter 33 applies. The jury will still be asked to apportion fault among one or more of the claimants, defendants, settling parties, and responsible third parties. Chapter 33 (2003) will primarily affect the following area of proportionate responsibility: (1) the range of persons who may be included as responsible third parties, and (2) the types of liability questions upon which the submission of such persons may be predicated.

Of importance is that the same pleadings and evidence requirements for the submission of a party to the jury will apparently remain intact. As such, a settling tortfeasor’s liability may only be submitted to the jury if the pleadings and evidence raise the issue of that person’s liability. Courts, applying the rules of statutory construction, have conjoined Tex. Civ. Prac & Rem. Code §33.003 (1995) with T.R.C.P. 278, and concluded that a settling person’s liability need be submitted to the jury only if the pleadings and evidence raise the issue of that person’s liability. This concept does not appear to have been changed under the revised Chapter 33, as it is virtually substantially identical to the old Chapter 33 (1995) provision.

A good illustration of this concept can be found in the Cooper case. In Cooper, the Plaintiff had settled with her doctor and had non-suited the nurses, but proceeded to trial against the hospital on a negligence theory. After the jury returned a verdict in favor of Cooper, the hospital moved to reform the judgment,

3 See PIC §§4.3, 51.5, 51.7, 61.6, 61.8, 66.11, 66.13, 71.12, 71.14. See also, “The Impact of HB4 on the Court’s Charge to the Jury,” Law Practice after HB4, The University of Texas School of Law, August-October 2003.

4 TEX. CIV. PRAC. & REM. CODE §33.003 (2003).

5 See, “The Impact of HB4 on the Court’s Charge to the Jury.”


8 Cooper at 153.

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1 TEX. CIV. PRAC. & REM. CODE §33.004(a) (2003), as of HB4, effective for actions filed on or after July 1, 2003.

2 Id. at §33.004(i).
asserting it was entitled to a credit for the settlement with the doctor.\textsuperscript{9} The trial court deducted the amount of the settlement and rendered judgment.\textsuperscript{10} On appeal, the hospital complained that the trial court refused to submit the requested question of the comparative responsibility of the settling doctor.\textsuperscript{11} The hospital complained that §33.003 mandated submission of the question to the jury.\textsuperscript{12}

The Court in \textit{Cooper} disagreed on two grounds.\textsuperscript{13} The Court found that §33.003 did not contradict T.R.C.P. 278, which as mentioned, requires evidence raising the issue of a party’s liability in order for the issue to be submitted to the jury. Second, the Court found that despite the mandatory wording of §33.003, the legislature did not intend to require juries to assess responsibility when none was alleged or proven. The Court in \textit{Cooper} pointed to §33.002(f), which stated, “nothing in this section shall require submission to the jury of a question regarding conduct by any party absent sufficient evidence to support the submission.” As such, the Courts found that the Texas Civil Practice & Remedies Code only required submission of a question on the comparative responsibility of a settling defendant if there are pleadings alleging, and evidence supporting, liability on the part of a settling defendant.\textsuperscript{14}

Therefore, as will be discussed below, even though a defendant need not join a responsible third party into a lawsuit under Chapter 33 (2003), they will still be required to provide sufficient evidence in order to submit the designated responsible third party to the jury. In a medical malpractice lawsuit, this evidence, as always, will most likely be introduced through expert testimony.

\textbf{III. WHO CAN BE DESIGNATED AS A RESPONSIBLE THIRD PARTY}

The biggest change between the revised and the old Chapter 33 may be in the manner in which “Responsible Third Party” is defined. The new Chapter 33 definition of Responsible Third Party is much broader and more inclusive than the old definition.

Under TEX. CIV. PRAC. & REM. CODE §33.011 (old law in effect since 1995 through June 30, 2003), “responsible third party” was defined as:

\begin{itemize}
  \item \textbf{(6)(A)} “Responsible third party” means any person to whom all of the following apply:
  \begin{itemize}
    \item \textbf{(i)} the court in which the action was filed could exercise jurisdiction over the person;
    \item \textbf{(ii)} the person could have been, but was not, sued by the claimant; and
    \item \textbf{(iii)} the person is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant or defendants.
  \end{itemize}

  \item \textbf{(B)} The term “responsible third party” does not include:
  \begin{itemize}
    \item \textbf{(i)} the claimant’s employer, if the employer maintained workers’ compensation insurance coverage, as defined by section 401.011(44), Labor Code, at the time of the act, event, or occurrence made the basis of the claimant’s suit; or
    \item \textbf{(ii)} a person or entity that is a debtor in bankruptcy proceedings or a person or entity against whom this claimant has been discharged in bankruptcy, except to the extent that liability insurance or other source of third party finding may be available to pay claims asserted against the debtor.
  \end{itemize}
\end{itemize}

Pursuant to this statutory definition of responsible third party, a defendant wishing to join or sue another party as a responsible third party, had to overcome a number of procedural hurdles. A primary example would be when a defendant would want to name a non-resident of Texas as a possible responsible third party. If the court found that it did not have personal jurisdiction over this non-resident party due to lack of minimum contacts, that party would not be able to be joined into the lawsuit as a responsible third party under this definition. Moreover, if any procedural immunity attached to a possible culpable third party, a defendant would not be able to join them

\begin{itemize}
  \item \textbf{9} Id.
  \item \textbf{10} Id.
  \item \textbf{11} Id.
  \item \textbf{12} Id. at 154. \textit{See also, Betancourt,} at 357.
  \item \textbf{13} Id.
  \item \textbf{14} Betancourt at 358.
\end{itemize}
into the suit because that person could never have been sued by the claimant.\textsuperscript{15}

As mentioned, under the newly revised statute, responsible third party has a much broader scope. Any and all hurdles to the designation of a responsible third party have been eliminated.

The new definition includes only one exclusion. A “responsible third party” is defined as “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 a combination of these. The term ‘responsible third party’ does not include a seller eligible for indemnity under Section 82.002.”\textsuperscript{16}

In essence, the revised statute allows a defendant more latitude in apportioning fault, and consequently, its responsibility to a claimant’s alleged damages, may be diluted. The elimination of the procedural hurdles required by Chapter 33 (1995) will make it more feasible to include all responsible parties into the same lawsuit and eliminate the need for any re-litigation of similar issues against unnamed parties.\textsuperscript{17}

\section*{IV. STATUTORY MECHANICS IN DESIGNATING A RESPONSIBLE THIRD PARTY}

In order to designate a responsible third party, a defendant must file a Motion for Leave to Designate the responsible third party.\textsuperscript{18}

As discussed, procedurally and substantively, Chapter 33 (2003) will make it much easier for defendants to have responsible third parties than it was under the old Chapter 33 (1995). First, the definition of a responsible third party is much broader and allows for the designation of “any person who is alleged to have caused or contributed to...” Second, there will be fewer impediments to the designation of a responsible third party.

A Motion for Leave must be filed on or before the sixtieth day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.\textsuperscript{19} Therefore, there is a time constraint to designate a responsible third party. The statute provides the court with some discretion (\textit{a good cause standard}) to allow the designation of a responsible third party after the prescribed deadline.

Once a defendant has filed their Motion for Leave, the court must grant leave to designate the named person, unless another party to the suit files an objection to the Motion for Leave on or before the fifteenth day after the date the motion was served.\textsuperscript{20} Therefore, should any party opposing the designation fail to file their objection within the fifteenth day, the statute prescribes that the motion should automatically be granted.

If a party opposes the designation, the objecting party must establish:

\begin{enumerate}
\item the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and
\item after having been granted leave to re-plead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure.\textsuperscript{21}
\end{enumerate}

This burden on the objecting party seems to be severe considering that the Rules of Civil Procedure establish only the requirement to notice the parties.

Therefore, a court is required to grant leave to designate the named person as a responsible third party unless another party files an objection to the Motion for Leave on or before the fifteenth day after the date the motion is served.\textsuperscript{22} Moreover, it appears that the plaintiff only has one basis to object to the designation, that being that the defendant did not plead sufficient facts concerning the alleged responsibility of a person to satisfy the pleading requirements. According to the statute, “if an objection to the Motion for Leave is timely filed, the


\textsuperscript{16} TEX. CIV. PRAC. \& REM. CODE §33.011(6), \textit{effective for actions filed on or after July 1, 2003.}

\textsuperscript{17} \textit{See, “Lawyers Still Trying to Do Math: Proportionate Responsibility, Including the New HB4.”}

\textsuperscript{18} TEX. CIV. PRAC. \& REM. CODE §33.004(a) (2003).
court shall grant leave to designate the person as a responsible third party unless the objecting party establishes...” the failure to meet the basic pleading requirements of the rules. 23

As established, a defendant’s threshold to designate a third party appears to be minimal. Making things even easier for the defendant, Chapter 33 (2003) entitles a defendant to a second chance to designate. 24 If a plaintiff meets the burden of establishing a valid objection, (i.e., a defendant could not meet the basic pleading requirements) then, obviously the designation would only occur if the defendant was granted leave to replead and subsequently comply with the requirements of the Texas Rules of Civil Procedure. 25 Importantly, the statute does not explicitly grant a defendant the right to replead, but the statute strongly presumes the right will exist in that it is worded in the past tense “after having been granted leave to replead...” Therefore, most defendants should be able to fulfill their burden of pleading sufficient facts given that the statute presumably allows a defendant two chances to meet the basic pleading requirement. 26

If a court grants a Motion for Leave to designate a person as a responsible third party, the designation becomes automatic without any further action by the court or any other party. 27

A plaintiff may still seek to remove a designated responsible third party through a Motion to Strike. 28 Specifically, the statute prescribes, “after adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground there is no evidence that the designated person is responsible for any portion of the claimant’s alleged injury or damage. 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.” 29

The statute does not expressly state an adequate time for discovery. It is unclear whether the discovery period for the designation will be linked to the overall discovery period of the case, or whether there will be two separate discovery periods. As such, to avoid confusion, attorneys should delineate deadlines for the designation of responsible third parties through a docket control order. This practice may help avoid any confusion as to deadlines for designating responsible third parties. 30

In conclusion, the new statute has made it considerably easier, both procedurally and substantively, for a defendant to ensure that every party that may be apportioned liability is included in the lawsuit.

V. SUBMISSION OF A DESIGNATED RESPONSIBLE THIRD PARTY TO THE JURY

Designating a responsible third party does not assure that the designated party will be submitted to the jury. TEX. CIV. PRAC. & REM. CODE §33.003(b) states, “this section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.” As such, in a medical malpractice case, a defendant will have to produce expert testimony showing that the designated responsible third party was negligent and that the negligence proximately caused the plaintiff’s alleged damages in order to argue that there is sufficient evidence to support the submission of the third party to the jury.

Submission of a third party to the jury will most likely entail the same evidentiary hurdles as encountered with lawsuits filed before July 1, 2003. TEX. CIV. PRAC. & REM. CODE §33.002(f) (which §33.003(b) has replaced) stated, “nothing in this section shall require a submission to the jury of a question regarding conduct by any party absent sufficient evidence to support this submission,” and, thus was virtually substantively identical to the new §33.003(b).

Additionally, the new Chapter 33 allows a plaintiff to join someone designated as a responsible third party in the lawsuit. “If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person not later than sixty (60) days after that person is designated as a responsible third party.” 31 Consequently, a Plaintiff will

23 Id. §33.004(g).


25 Id. §33.004(g)(2).


27 TEX. CIV. PRAC. & REM CODE §33.004(h) (2003).

28 Id. §33.004(i).

29 Id.


31 TEX. CIV. PRAC. & REM. CODE §33.004(e) (2003).
be able, if it desires, to join a party against whom suit was previously barred by limitations, and thus the manner in which insurance carriers provide coverage through claims-made policies may be drastically affected. It seems as if the revised statute may create a long and possibly unlimited period of limitations.

Through the discovery process, plaintiffs will ascertain the existence of potential responsible third parties. Plaintiffs may argue that failure to disclose a potential responsible third party in response to appropriate written discovery requests should be a basis for rejecting the designation. However, as mentioned previously, the statute gives only one basis for the court to reject the designation, and that is, failure to meet the pleading requirements of the Rules of Civil Procedure. Nevertheless, the argument could be made that a violation of the rules is a basis for the court to reject the designation, assuming that other Rules of Civil Procedure are being followed.32

For strategic reasons, a plaintiff may not want to join a potential responsible third party in a lawsuit. If the person is not designated, then that person will not be submitted to the jury. This, of course, would avoid the dilution of the percentages of responsibility. However, by joining a potential responsible third party, the Plaintiff assures the party will not just be an empty chair in the courtroom, and someone the other Defendants can point to as responsible during trial.33

An additional reason a Plaintiff may want to join a designated or potentially designated third party is to avoid having a suit stall just sixty days before trial, and face a potential continuance. As such, it is probably important for both parties to consider setting a specific deadline in the docket control order for the designation and joining of responsible third parties in a lawsuit.34

VI. DILUTING RESPONSIBILITY

Chapter 33 (2003) may allow Defendants to dilute their percentage of responsibility.

Under Chapter 33 (1995), the general rule of no joint and several liability existed. A liable Defendant was liable to a claimant only for the percentage of damages found by the trier of fact equal to that Defendant’s percentage of responsibility.35 Chapter 33 (1995) contained the “over 50 percent” exception. A liable Defendant was jointly and severally liable if “the percentage of responsibility attributed to the Defendant is greater than 50 percent.”36 Under Chapter 33 (1995), the Plaintiffs had no ability to control who was submitted to the jury.37 The trier of fact, as to each cause of action asserted, determined the percentage of responsibility, stated in whole numbers, for each claimant, each Defendant, each settling person, and each responsible third party who had been joined in the case.38

As mentioned previously, a “responsible third party,” is a person over whom the court in which the case was filed could exercise jurisdiction. Under Chapter 33 (1995), a defendant could bring other parties into the case even if the plaintiff did not. A defendant could bring in any number of responsible third parties to try and drive down the defendant’s percentage of responsibility. The more parties involved, the more likely that the defendant would be found less than 50 percent responsible, and consequently, avoid joint and several liability. A plaintiff could be confronted with the fact that the liable defendant could be found close to 50 percent responsible, but because of the joint responsible third parties who were assessed a percentage of responsibility by the jury, without adequate insurance coverage, the plaintiff was unable to recover all of its damages.39

Chapter 33 (2003) has not abandoned the general rule that there is no joint and several liability. A Defendant is still jointly and severally liable for the damages claimed with respect to a cause of action if the percentage of responsibility attributed to the Defendant with respect to a cause of action is greater than 50 percent.40

Chapter 33 (2003) still contains the “over 50 percent exception.” However, a significant change in the statute, will be in the manner that Defendants can further avoid getting to the 50 percent responsibility point. A Defendant no longer has to join a responsible third party

33 Id.
34 Id.
36 Id. §33.013(b).
38 TEX. CIV. PRAC. & REM. CODE §33.003 & 33.004 (1995).
39 Id.
into the lawsuit. A Defendant only has to designate a responsible third party.

Additionally, as discussed above, the designation of a responsible third party only requires the Defendant to file a Motion for Leave to designate such a party, and the reasons a court may deny such a designation are extremely limited. By allowing a Defendant to designate responsible third parties, the Defendant may shift responsibility to an unlimited number of other parties without having to carry the burden of filing suit against those parties as previously required. However, whether this new mechanism of diluting responsibility for a Defendant is logistically manageable, has yet to be determined. One can foresee many difficulties for defendants who designate responsible third parties. If a defendant designates a responsible third party, it is not a foregone conclusion that the third party will be joined as a named defendant. Animosity will be created by such designation, therefore, the responsible third party may not support the defendant’s theories. Rather, they may side with the plaintiff. As such, the defendant may have to defend against the responsible third party’s allegations. In short, it will be interesting to discover the strategies that both plaintiffs and defendants will have to consider regarding these new procedures in proportionate responsibility.

VII. SETTLEMENT CONSEQUENCES

Under Chapter 33 (1995) a true settlement must have existed. In order to have a valid settlement, the plaintiff had to release the defendant from some liability and value must be exchanged in consideration for this release.41 Under Chapter 33 (1995) if the plaintiffs settled with one or more parties, the remaining parties received a credit for the settlement. This credit was calculated by reducing the total amount to be recovered by the plaintiff.42 This reduction was carried out in one of two ways. The first, was to reduce the recovery by the sum of the dollar amounts of all settlements.43 The second, was to reduce the recovery by a dollar amount equal to the sum of the potential four tiered equation.44 The four tiered equation was based upon the amount of damages found by the trier of fact after any reduction.

The progressive four tiered equation, depended on the dollar amount for which Defendants were liable after any reduction.45

Chapter 33 (2003) has established a new general rule involving settlements. If the Plaintiff has settled with one of the parties, the Plaintiff’s recovery will be reduced by a percentage equal to each settling person’s percentage of responsibility.46 The revised statute has eliminated the four tiered equation as well as the dollar for dollar credit. The dollar for dollar credit, however, may still be applicable in healthcare liability claims.

Settlements in healthcare liability claims are addressed in a separate section under the revised statute.47 §33.012(c) creates the only exception to the general rule. If the Plaintiff has settled with one or more parties, the Plaintiff’s recovery will be reduced “by a percentage equal to each settling person’s responsibility.” In lawsuits involving healthcare liability, the Defendant may elect to reduce the claimant’s recovery by either using the general settlement rule or the sum of the dollar amounts of all settlements.48

If no Defendant makes an election or if there is a conflict and the Defendants are not unanimous in choosing a percentage reduction, the Plaintiff’s recovery will be reduced by the sum of all dollar amounts of all settlements.49 The new statute has eliminated the requirement that the election on how to reduce percentages be made in writing or before the submission of the case to the jury. Chapter 33 (1995) had this requirement.50 However, in medical malpractice lawsuits, it is probably prudent to make the election on reduction of percentages in writing especially if there are conflicting views on how to reduce the percentages among the Defendants. Distilling the reduction of percentages in writing, will preserve the record of the election.

Of importance, is that other than medical malpractice lawsuits, it no longer matters how much a party has paid in settlement. The Plaintiff’s recovery


46 TEX. CIV. PRAC. & REM. CODE §33.012(b) (2003).

47 Id. §33.012(c).


49 TEX. CIV. PRAC. & REM. CODE §33.012(c) (2003).

50 Id.
reduction due to settlement has nothing to do with how much was actually paid. Under the new statute, the reduction is entirely dependent on the jury’s finding of the settling person’s percentage of responsibility.

VIII. CONCLUSION

It will be interesting to see how these revisions in proportionate responsibility play out in real practice. I do not believe that years from now we will believe the new provisions had any meaningful changes in defense of malpractice cases. The defendant with deep pockets is still confronted with the difficult decision of whether to add third parties to a lawsuit thereby bringing in new enemies to assist the plaintiff. In fact, a responsible third party not made a party by the plaintiff could go one of two directions. The responsible third party could fall on the sword and assist the remaining defendants, or make a deal with the plaintiff in order to avoid being brought in as a third party defendant. The virtually unlimited expansion of the statute of limitations may also have profound impact when defendant healthcare providers are added to cases as defendants 3, 4 and 5 years after the care rendered.