PROPORTIONATE RESPONSIBILITY/
RESPONSIBLE THIRD PARTY

Written By:

KNOX NUNNALLY, *Houston
Vinson & Elkins

ANDREW D. SLANIA*

Presented By:

KNOX NUNNALLY

MICHAEL C. SMITH, *Marshall
The Roth Law Firm

State Bar of Texas
23RD ANNUAL ADVANCED
PERSONAL INJURY LAW COURSE
July 18 - 20, 2007 — Dallas
August 1 - 3, 2007 — San Antonio
August 22 - 24, 2007 — Houston

CHAPTER 9

*Past contributing authors include Benjamin F.S. Elmore, Patrick M. Dennis, and Sabrina Little DiMichele
# TABLE OF CONTENTS

## I. SCOPE OF PAPER

II. INDEMNITY

### A. Common Law Indemnity

1. Purely Vicarious Liability
2. Innocent Retailer

### B. Statutory Indemnity

1. Between Sellers and Manufacturers
2. Oilfield & Mine Anti-Indemnity Act
3. Architects/Engineers Anti-Indemnity Act
4. Indemnity for Electric Power Companies
5. Dram Shop Indemnity Rejected

### C. Contractual Indemnity

1. Nature and Purpose of Indemnity Agreements
2. Requisite Language for an Indemnity Contract: Express Negligence Doctrine
   a. Examples of Indemnity Agreements
3. Tying an Indemnity to Work Performed under a Contract
4. The Requirement of Conspicuousness
   a. What Makes a Provision Conspicuous
   b. The Actual Knowledge Defense
5. Legal Fees
6. Theories of Liability Other than Negligence
7. Indemnity for Gross Negligence

### D. Indemnity May Be Affected by Statute

1. Electric Companies
2. Architects and Engineers
3. Deceptive Trade Practices Act

## III. PROPORTIONATE RESPONSIBILITY (at times known as "Contribution" or "Comparative Negligence")

### A. What Law Applies

### B. 1995 Tort Reform - The Proportionate Responsibility Statute

1. Does the 1995 proportionate responsibility statute apply?
2. 51% Bar
3. Joint and Several Liability
a. The primary rule: no joint liability unless more than 50% at fault .................................................. 18
b. When joint liability still applies .......................................................... 18
4. Responsible Third Parties ............................................................................... 19
5. Settlements & Credits .................................................................................... 21
C. 2003 Tort Reform ........................................................................................................ 22
   1. Does the 2003 Proportionate Responsibility Statute Apply? ..................... 22
   2. Responsible Third Parties ............................................................................... 22
      a. Joinder is No Longer Required, Just Designation ............................. 23
      b. File the Motion to Designate Anytime On or Before the 60th Day Before Trial .............................................................. 23
      c. The Motion to Designate May be Filed After Limitations .......... 23
      d. Objecting to the Designation of a Responsible Third Party........... 23
      e. Responsible Third Party Does Not Include a Seller Eligible for Indemnity under Chapter 82. ........................................ 24
      f. The Responsible Third Party Can Be a Person Over Whom the Court Has No Jurisdiction and Who May Not Even Be Liable to the Plaintiff .................................................. 24
      g. “John Doe” Criminally Responsible Third Parties ..................... 24
      h. Striking a Designation of a Responsible Third Party .................. 25
   3. Determination of Percentage of Responsibility ............................................. 25
   4. Submission Must Be Supported By the Evidence ......................................... 25
   5. Settlements & Credits ...................................................................................... 25
      a. Credit for Claimant’s Percentage of Responsibility ........................ 26
      b. Credit for Settlements in Non-Health Care Liability Claims ......... 26
      c. Credit for Settlements in Health Care Liability Claims .............. 26
   6. Joint & Several Liability ................................................................................... 26
   7. Definition of Claimant Expanded ................................................................... 26
   8. Definition of “Settling Person” Modified ....................................................... 27
D. 2005 Legislation ..................................................................................................... 27
   1. Does the 2005 amendment to the proportionate responsibility statute apply? ........................................................................ 27
   2. Settlement credits in non-health care liability claims .............................. 27
IV. OTHER ISSUES RELATED TO CONTRIBUTION AND INDEMNITY ............... 27
   A. Contribution and Indemnity under Article 21.21 of the Insurance Code ........ 27
   B. Statutes of Limitations for Contribution and Indemnity .............................. 27
C. The Single Injury Rule ........................................................................................................ 28
D. No Contribution for Exemplary Damages ........................................................................ 28
E. Waiver and Postjudgment Contribution .......................................................................... 28
F. Double Dipping Not Allowed ............................................................................................ 28
G. Derivative Claim Problems: Utts & Drilex ..................................................................... 30
H. Circular Indemnity ............................................................................................................. 31
I. Proof Problems Associated with the Settlement Credit ..................................................... 31
V. CONCLUSION ......................................................................................................................... 32