

PROPORTIONATE RESPONSIBILITY & INDEMNITY

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I. SCOPE OF PAPER¹

This paper will address indemnity and proportionate responsibility law in Texas including the impact of H.B. 4 and the 2005 amendments to Chapter 33. Much of the paper is devoted to the changes to Texas' complex proportionate responsibility law for cases filed on and after July 1, 2003. Included is an analysis of (1) which of the multiple proportionate responsibility schemes apply, (2) the mechanisms for the calculations of a judgment, and (3) the various statutory provisions associated with this complex area of the law.

The terms "contribution" and "indemnity" are frequently used synonymously. Nevertheless, these two words have different meanings. "Contribution" is the payment by a joint tortfeasor of its proportionate share of the plaintiff's damages to any other tortfeasor, who has previously paid more than his proportional share. See Chapter 32 of the Texas Civil Practice and Remedies Code. "Contribution" claims are generally handled in a separate question after the jury apportions responsibility between plaintiffs, settling parties, responsible third parties, and defendants pursuant to Chapter 33 of the Texas Civil Practice and Remedies Code. But the creation of responsible third party practice eliminates most instances when a traditional "contribution" submission will be necessary.

"Proportionate responsibility" is the statutory basis for allocating fault between plaintiffs, defendants, responsible third parties, and settling parties. Further, the laws of "proportionate responsibility" set forth the method for reducing verdicts as a result of settlements or plaintiffs' contributory negligence. The law of "proportionate responsibility" is set forth in Chapter 33 of the Texas Civil Practice and Remedies Code.

Finally, "indemnity" is the shifting of the entire liability to the plaintiff from one joint tortfeasor to another. Essentially, "indemnity" shifts the entire loss while "contribution" is a sharing of the loss presumably in proportion to each tortfeasor's level of fault or overall culpability.

II. INDEMNITY

A. Common Law Indemnity

At one time, common law indemnity was a substantial and important body of law that affected the rights and obligations of joint tortfeasors. Today, however, common law indemnity is only available in two areas. "The only remaining vestiges of common law indemnity involve purely vicarious liability or the innocent product retailer situation." *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179, 180 (Tex. 1980)(per curiam). The all-or-nothing aspect of common law indemnity is obviously not consistent with the proportionate sharing of liability based on allocation of fault that underlies current contribution law in Texas, and as a result, common law indemnity only applies in very limited circumstances as described below.

¹ This paper is the latest revision of a paper authored by KNOX NUNNALLY of Vinson & Elkins, LLP, ANDY PAYNE of Payne Law Group, LLP and REAGAN SIMPSON of King & Spalding, LLP in their discussions on contribution and indemnity for the State Bar in its Advanced Personal Injury Law Course for 2003. MICHAEL SMITH of the ROTH FIRM further updated the paper for the State Bar Advanced Personal Injury Seminar in 2005. The author gratefully acknowledges all of these individuals' contributions to this work.

1. Purely Vicarious Liability

Purely vicarious liability, as in the sense of *respondeat superior*, still affords indemnity from one tortfeasor to another. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819-20 (Tex. 1984); *Knutson v. Morton Foods, Inc.*, 603 S.W.2d 805, 808 (Tex. 1980). Typically, this situation, arises is when an employer, without independent fault, is held responsible for the torts of its employee that were committed within the scope of the employee's employment. Under these circumstances an employer may bring an action against its employee to recover the full amount of the damages that the employer paid as a result of the employee's wrongful conduct.² For example, under common law, an employer can obtain indemnity from its employee who negligently backs over a child with a lawn mower. *See South Austin Drive-In Theater v. Thomison*, 421 S.W.2d 933, 948-49 (Tex. Civ. App. - Austin 1967, writ ref'd n.r.e.).

2. Innocent Retailer

As a result of legislation affecting actions commenced after September 1, 1993, *see Tex. Civ. Prac. & Rem. Code Ann. § 82.002*, retailers will be unlikely to rely on the common law when seeking indemnification from manufacturers of allegedly defective products. This legislation, which is discussed in more depth below, makes it easier for innocent retailers to receive indemnification from manufacturers by reversing the burden of

² It is important to distinguish contribution actions based on an employee's alleged proportionate fault (employee's negligence) for a personal injury to himself during the scope of his employment. Under these circumstances, the employer's contribution action is barred by Texas worker's compensation law, notwithstanding whether the employer is a subscriber or non-subscriber to the state's worker's compensation insurance system. *See The Kroger Co. v. Keng*, 23 S.W.3d 347 (Tex. 2000).

proof to favor retailers: A retailer is entitled to indemnification unless and until the manufacturer establishes the retailer's independent liability.

Texas common law permits "a retailer or other member of the marketing chain to receive indemnity from the manufacturer of the defective product when the retailer or other member of the marketing chain is merely a conduit for the defective product and is not independently culpable." *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984). At common law, the retailer was required to bring a separate action for indemnity following the resolution of the underlying products liability action. Under the common law, as a condition to receiving full indemnification from the product manufacturer, the retailer bears the burden of proving that it is not independently culpable for the defective product.

The indemnified party may generally recover attorney's fees under the common law. *Conann Constructors, Inc. v. Muller*, 618 S.W.2d 564 (Tex. App.—Austin 1981, writ ref'd n.r.e.). However, a retailer may only seek recovery of attorney's fees incurred defending a product liability action when a judicial determination of liability is made. When no judicial determination of liability against the manufacturer is made because of settlement or dismissal, the retailer has no common law right to be indemnified for attorney's fees and costs. *Humana Hosp. v. American Medical Systems*, 785 S.W.2d 144 (Tex. 1990).

B. Statutory Indemnity

1. Between Sellers and Manufacturers

In 1993, the Texas legislature enacted a statute defining a manufacturer's

duty to indemnify innocent retailers/sellers for losses incurred while defending against a products liability action. *See Tex. Civ. Prac. & Rem. Code Ann. §82.002.* Section 82.002 requires a manufacturer to indemnify a seller against all losses arising out of actions that involve allegations of a product defect, regardless of the legal theory advanced by the plaintiff. *See Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001). The statute defines "losses" as reasonable damages, court costs and other reasonable expenses and reasonable attorney's fees. *See Tex. Civ. Prac. & Rem. Code Ann. §82.002(b).* However, the manufacturer is not obligated to indemnify the seller for losses caused by the seller's own negligence or intentional conduct for which the seller would be independently liable. *Tex. Civ. Prac. & Rem. Code Ann. §82.002(a).*

Section 82.002(a) grants the seller indemnity rights at the moment product defect is alleged by a plaintiff, and maintains those rights unless the manufacturer can establish that the seller's negligence or other independent action was a cause of the plaintiff's injuries. In effect, the manufacturer is presumed to be liable for all "losses" incurred during the litigation unless and until there is a judicial determination of the seller's independent liability. *Meritor*, 44 S.W.3d at 90; *see also Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, 996 S.W.2d 864, 867 (Tex. 1999) (manufacturer must indemnify seller for fees and costs in case where seller is dismissed from suit as having no liability, including situation in which seller is not even in chain of distribution).

The duty to indemnify under section 82.002 applies without regard to the manner in which the plaintiff's underlying products liability action is concluded, *see Tex. Civ. Prac. & Rem. Code Ann. §82.002(e)(1),*

meaning that the manufacturer must indemnify the seller for its losses even if the action settles before trial or results in a verdict favorable to the manufacturer and seller. The manufacturer will escape its indemnification responsibility only if it can establish and receive a judicial determination, perhaps during litigation of a seller's action to enforce indemnity rights, that the seller was independently negligent or otherwise independently liable. How a court or jury might then allocate damages/settlement payments and attorney's fees incurred among the seller's defenses against an independent negligence claim and a products liability claim, remains unclear.

Additionally, the statute provides that the duty to indemnify under section 82.002 is in addition to any duty to indemnify established by contract. *See Tex. Civ. Prac. & Rem. Code Ann. §82.002(e)(2).*

Finally, the statute makes clear that not only will the seller, in the absence of independent liability, be entitled to indemnification of losses incurred defending against the underlying products liability action, it also will be entitled to recover from the manufacturer all reasonable court costs, attorney's fees and damages it incurred to enforce its right to indemnification. *See Tex. Civ. Prac. & Rem. Code Ann. §82.002(g).*

2. Oilfield & Mine Anti-Indemnity Act

No discussion of indemnity law in Texas is complete without some reference to a special statute governing indemnities in the oil patch. On September 1, 1985, the Texas Legislature enacted Chapter 127 of the Texas Civil Practice & Remedies Code, which imposes additional restrictions on indemnities in oilfield and mining industries. This statute had its beginning in the Texas

Legislature's determination that large oil companies were imposing unfair indemnity agreements on contractors because of unequal bargaining power. *See Tex. Civ. Prac. & Rem. Code Ann. §127.002 (Vernon 1997 & Supp. 2003); see generally Ken Petroleum Corp. v. Questor Drilling Corp., 24 S.W.3d 344, 348 (Tex. 2000).* Under §127.002, the Legislature sets forth its finding that "an inequity is fostered on certain contractors by the indemnity provisions in certain agreements pertaining to wells for oil, gas, or water or to mines for other minerals." Specifically, agreements that "provide for indemnification of a negligent indemnitee are against the public policy of this state." *See Tex. Civ. Prac. & Rem. Code Ann. §127.002(b) (Vernon 1997 & Supp. 2003).* Other pertinent sections of the statute are as follows:

- §127.003. Agreement Void and Unenforceable

(a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:

(1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and

(2) arises from:

- (A) personal injury or death;
- (B) property injury; or

(C) any other loss, damage, or expense that arises from personal injury, death, or property injury.

- §127.004. Exclusions

This chapter does not apply to loss or liability for damages or an expense arising from:

- (1) personal injury, death, or property injury that results from radioactivity;
- (2) property injury that results from pollution, including cleanup and control of the pollutant;
- (3) property injury that results from reservoir or underground damage, including loss of oil, gas, other mineral substance, or water or the well bore itself;
- (4) personal injury, death, or property injury that results from the performance of services to control a wild well to protect the safety of the general public or to prevent depletion of vital natural resources; or
- (5) cost of control of a wild well, underground or above the surface [i.e., the "Red Adair exclusion"].

- §127.005. Insurance Coverage

(a) This chapter does not apply to an agreement that provides for indemnity if the parties agree in writing that the indemnity obligation will be supported by liability insurance coverage to be furnished by the indemnitor subject to the limitations specified in Subsection (b) or (c).

(b) With respect to a mutual indemnity obligation, the indemnity obligation is limited to the extent of the coverage and dollar limits of insurance or qualified self-insurance each party as

indemnitor has agreed to obtain for the benefit of the other party as indemnitee.

(c) With respect to a unilateral indemnity obligation, the amount of insurance required may not exceed \$500,000.

Tex. Civ. Prac. & Rem. Code Ann. §§127.003-127.005 (Vernon 1997 & Supp. 2003).

Since the anti-indemnity statute has been amended so often, the lawyer should always determine what version of the statute controls. *See, e.g., Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d at 346, 348 & nn.2&3 (applying 1991 version of 1973 act, which court notes was amended in 1989, 1991, 1995, and 1999); *Ranger Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 78 S.W.3d 659, 661 & n.2 (Tex. App.-Houston [1st Dist.] 2002, no pet.) (applying 1995 version, not current statute). Previously, the statute required insurance in equal amounts for mutual indemnities, a requirement that no longer exists. *See id.*

3. Architects/Engineers Anti-Indemnity Act

On September 1, 1987, the Texas Legislature enacted Chapter 130 of the Civil Practice and Remedies Code, the Architects/Engineers Anti-Indemnity Act. This Act voids any agreement by which a contractor is to indemnify a registered architect or licensed engineer from liability that results from defects in plans, designs or specifications prepared by the architect or engineer, or the negligence of the architect or engineer in the rendition of professional duties arising out of the contraction contract, so long as the indemnity obligation arises from personal injury or death or property injury or any other expense that arises from injury, death, or property damage. *See Tex.*

Civ. Prac & Rem. Code Ann. §130.002(a). Likewise, an agreement is void under the Act if it requires an architect or licensed engineer whose engineering or architectural design services are subject of the construction contract to indemnify an owner for liability caused by the negligence of the owner. *See id.* at §130.002(b).

This statute has been considered in only one Texas case. In *Foster, Henry, Henry & Thorpe, Inc., v. J.T. Construction Co.*, 808 S.W.2d 139 (Tex. App. - El Paso 1991, writ denied), the court considered the application of Chapter 130, but held it did not apply because the indemnity did not purport to protect an architect from its own conduct but from the conduct of a contractor.

Some provisions of interest are as follows:

- §130.001. Definition

In this chapter “construction contract” means a contract or agreement made and entered into by an owner, contractor, subcontractor, registered architect, licensed engineer, or supplier concerning the design, construction, alteration, repair, or maintenance of a building, structure, appurtenance, road, highway, bridge, dam, levee, or other improvement to or on real property, including moving, demolition, and excavation connected with the real property.

- §130.002. Covenant or Promise Void and Unenforceable

(a) A covenant or promise in, in connection with, or collateral to a construction contract is void and unenforceable if the covenant or promise provides for a contractor who is to perform the work that is the subject of the construction contract to indemnify or hold harmless a registered architect, licensed

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engineer or an agent, servant, or employee of a registered architect or licensed engineer from liability for damage that:

- (1) is caused by or results from:
 - (A) defects in plans, designs, or specifications prepared, approved, or used by the architect or engineer; or
 - (B) negligence of the architect or engineer in the rendition or conduct of professional duties called for or arising out of the construction contract and the plans, designs, or specifications that are a part of the construction contract; and
- (2) arises from:
 - (A) personal injury or death;
 - (B) property injury; or
 - (C) any other expense that arises from personal injury, death, or property injury.

(b) A covenant or promise in, in connection with, or collateral to a construction contract other than a contract for a single family or multifamily residence is void and unenforceable if the covenant or promise provides for a registered architect or licensed engineer whose engineering or architectural design services are the subject of the construction contract to indemnify or hold harmless an owner or owner's agent or employee from liability for damage that is caused by or results from the negligence of an owner or an owner's agent or employee.

- §130.003. Insurance Contract; Workers' Compensation

This chapter does not apply to:

- (1) an insurance contract; or
- (2) a workers' compensation agreement.

- §130.004. Owner of Interest in Real Property

(a) Except as provided by Section 130.002(b), this chapter does not apply to an owner of an interest in real property or persons employed solely by that owner.

(b) Except as provided by Section 130.002(b), this chapter does not prohibit or make void or unenforceable a covenant or promise to:

- (1) indemnify or hold harmless an owner of an interest in real property and person employed solely by that owner; or
- (2) allocate, release, liquidate, limit, or exclude liability in connection with a construction contract between an owner or other person for whom a construction contract is being performed and a registered architect or licensed engineer.

- §130.005. Application of Chapter

This chapter does not apply to a contract or agreement in which an architect or engineer or an agent, servant, or employee of an architect or engineer is indemnified from liability for:

- (1) negligent acts other than those described by this chapter; or
- (2) negligent acts of the contractor, any subcontractor, any person directly or indirectly employed by the contractor or a subcontractor, or any person for whose acts the contractor or a subcontractor may be liable.

Tex. Civ. Prac. & Rem. Code Ann.
§§130.001 – 130.005.

4. Indemnity for Electric Power Companies

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The operation of this statute is fairly simple. Certain safety rules are required for persons working in or around overhead high power lines. If the person responsible for that work fails to follow those safety rules, then that person must pay the liability that may be incurred by the owner or operator of the power lines. The safety rules are set forth in the Texas Health & Safety Code, sections 752.003 through 752.006. The indemnity provision, enacted on September 1, 1989, is contained in section 752.008 of the Code.

The primary safety rules are often referred to as the 10-foot and 6-foot rules. Under the 10-foot rules, machinery, such as a crane, cannot be operated within 10 feet of a power line and a warning sign must be provided to advise equipment operators of that rule. The 6-foot rule applies to any other activity within six feet of a high voltage overhead line.

This indemnity statute was applied in *Chavez v. City of San Antonio*, 21 S.W.3d 435 (Tex. App. - San Antonio 2000, pet. denied). In that case, a tree trimmer was held not to be able to recover from the operator of the power lines when a tree limb came in contact with the lines that the tree trimmer was working near.

Sometimes, a fact question is raised by the safety rules. For example, in *Wolfenberger v. Houston Lighting & Power Co.*, 73 S.W.3d 444 (Tex. App. - Houston [1st Dist.] 2002, pet. denied), there was a factual dispute about whether the worker was more than six feet away from the power line when he was electrocuted. The court of appeals held that a summary judgment was improper because a jury had to determine the worker's distance from the lines at the time of his electrocution.

The following are the safety rules and indemnity provision located in the Texas Health & Safety Code:

- §752.003. Temporary Clearance of Lines
 - (a) A person, firm, corporation, or association responsible for temporary work or a temporary activity or function closer to a high voltage overhead line than the distances prescribed by this chapter must notify the operator of the line at least 48 hours before the work begins.
 - (b) A person, firm, corporation, or association may not begin the work, activity, or function under this section until the person, firm, corporation, or association responsible for the work, activity, or function and the owner or operator, or both, of the high voltage overhead line have negotiated a satisfactory mutual arrangement to provide temporary de-energization and grounding, temporary relocation or raising of the line, or temporary mechanical barriers to separate and prevent contact between the line and the material or equipment or the person performing the work, activity, or function.
 - (c) The person, firm, corporation, or association responsible for the work, activity, or function shall pay the operator of the high voltage overhead line the actual expense incurred by the operator in providing the clearance prescribed in the agreement. The operator may require payment in advance and is not required to provide the clearance until the person, firm, corporation, or association responsible for the work, activity, or function makes the payment.
 - (d) If the actual expense of providing the clearance is less than the amount paid, the

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operator of the high voltage overhead line shall refund the surplus amount.

- §752.004. Restriction on Activities Near Lines

(a) Unless a person, firm, corporation, or association effectively guards against danger by contact with the line as prescribed by Section 752.003, the person, firm, corporation, or association, either individually or through an agent or employee, may not perform a function or activity on land, a building, a highway, or other premises if at any time it is possible that the person performing the function or activity may:

(1) move or be placed within six feet of a high voltage overhead line while performing the function or activity; or

(2) bring any part of a tool, equipment, machine, or material within six feet of a high voltage overhead line while performing the function or activity.

(3) A person, firm, corporation, or association may not require an employee to perform a function or activity prohibited by Subsection (a).

- §752.005. Restriction on Operation of Machinery and Placement of Structures Near Lines

Unless a person, firm, corporation, or association effectively guards against danger by contact with the line as prescribed by Section 752.003, the person, firm, corporation, or association, either individually or through an agent or employee, may not:

(a) erect, install, transport, or store all or any part of a house, building, or other structure within six feet of a high voltage overhead line;

(b) install, operate, transport, handle, or store all or any part of a tool, machine, or equipment within six feet of a high voltage overhead line; or

(c) transport, handle, store all or any part of supplies or materials within six feet of a high voltage overhead line.

- §752.006. Restriction on Operation of Certain Machinery or Equipment

(a) A person, firm, corporation, or association, individually, through an agent or employee, or as an agent or employee, may not operate a crane, derrick, power shovel, drilling rig, hayloader, haystacker, mechanical cotton picker, pile driver, hoisting equipment, or similar apparatus any part of which is capable of vertical, lateral, or swinging motion unless:

(1) a warning sign is posted and maintained as prescribed by Subsections (b) and (c);

(2) an insulated cage-type guard or protective device is installed about the boom or arm of the equipment, except a backhoe or dipper; and

(3) each lifting line, if the equipment includes a lifting hook device, is equipped with an insulator link on the lift hook connection.

(b) The warning sign required by Subsection (a)(1) must be a weather-resistant sign of not less than five inches by seven inches with either a yellow background and black lettering, or with background coloring and lettering that conforms to the recommendations or requirements of regulations adopted by the

Occupational Safety and Health Administration for warning signs, that reads:

"WARNING - UNLAWFUL TO OPERATE THIS EQUIPMENT WITHIN TEN FEET OF HIGH VOLTAGE LINES."

(c) The warning sign must be legible at 12 feet and placed:

(1) within the equipment so that it is readily visible to the equipment operator while at the equipment controls; and

(2) on the outside of the equipment in the number and location necessary to make it readily visible to a mechanic or other person engaged in the work.

(3) Notwithstanding the distance limitations prescribed by Sections 752.004 and 752.005, unless a person, firm, corporation, or association effectively guards against danger by contact with the line as prescribed by Section 752.003, the person, firm, corporation, or association may not operate all or any part of a machine or equipment described in this section within 10 feet of a high voltage overhead line.

- §752.008. Liability for Damages

If a violation of this chapter results in a physical or electrical contact with a high voltage overhead line, the person, firm, corporation, or association that committed the violation is liable to the owner or operator of the line for all damages to the facilities and for all liability that the owner or operator incurs as a result of the contact.

Tex. Health & Safety Code Ann. §§752.003 – 752.006, 752.008.

5. Dram Shop Indemnity

Another form of statutory indemnity has been recognized by the Thirteenth Court

of Appeals, which interprets section 2.02 of the Texas Alcoholic Beverage Code to make sellers of alcoholic beverages vicariously liable for the conduct of their intoxicated patrons. *See F.F.P. Operating Partners, L.P. v. Duenez*, 69 S.W.3d 800 (Tex. App. - Corpus Christi 2002, pet. filed); Tex. Alc. Bev. Code §2.02 (Vernon 1995). This holding should be treated with caution, however, since while Texas Supreme Court affirmed the court of appeals' decision in a 5-4 ruling on September 3, 2004, it granted rehearing seven months later on April 8, 2005, after three of the members of the majority had departed the Court. Since granting the petition, another justice has departed, this time from the dissent. Thus the 5-4 ruling is now 2-3, with four new justices on board in the intervening nine months.

C. Contractual Indemnity

Apart from common law, parties frequently seek indemnity under contracts. An indemnity agreement is a "promise to safeguard or hold the indemnitee harmless against either existing and/or future loss of liability." *Dresser Industries v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). An indemnity agreement creates a cause of action under contract when the person indemnified incurs liability or is forced to defend a lawsuit covered by the indemnity. Under Texas law, it is possible to obtain indemnity protection for your own negligence, but the indemnity agreement must meet the strict requirements of the express negligence rule. *See Fisk Elec. Co. v. Constructors & Assocs.*, 888 S.W.2d 813 (Tex. 1994) (the issue of contractual indemnity will be an issue of contract construction, but if the indemnity contract does not meet the express negligence test there will be no indemnity).

1. Nature and Purpose of Indemnity Agreements

An indemnity agreement is a contractual provision that shifts liability from one party to another party. The term "indemnity" has been defined as "the payment of all of plaintiff's damages by one tortfeasor to another tortfeasor who paid the plaintiff." *General Motors Corp. v. Simmons*, 558 S.W.2d 855 (Tex. 1977), overruled on other grounds, *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984).

The law has never looked with great favor upon shifting liability for one's conduct. There is some vague, and very debatable, notion that persons protected by an indemnity agreement will exercise less care than if they were to be responsible for their own conduct. There is also a repugnance to the harshness of shifting liability for one's conduct. Moreover, the harsh result in an indemnity contract is often the product of unequal bargaining power. For those reasons, among others, Texas courts have applied the doctrine of strict construction to indemnity agreements. See, e.g., *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987); *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64, 68 (Tex. Civ. App. - Tyler 1978, writ ref'd n.r.e.). That puts a premium on the lawyer's drafting skills and encourages litigation over indemnity agreements.

2. Requisite Language for an Indemnity Contract: Express Negligence Doctrine

The evolution of indemnity agreements under Texas law makes for interesting history. For the purpose of this presentation, however, there is no reason to recount that history; and so let us fast-forward to the watershed case of *Ethyl Corp.*

v. *Daniel Construction Co.*, 725 S.W.2d, 705 (Tex. 1987). In that case, the Texas Supreme Court adopted the "express negligence test." That test requires an indemnity to use the word "negligence" and to state in so many words that one party is being indemnified for the consequences of its own negligence by the other party to the contract.

The reason for that rule was to prevent artful drafting, to give contracting parties fair notice of the effects of their agreements, and to put an end to litigation over the various sneaky indemnity agreements that lawyers were concocting. Consequently, after *Ethyl*, indemnity agreements are no longer valid if they simply provide that Company A would indemnify Company B for everything in the world except the sole negligence of Company B. Instead, the agreement would have to say specifically that Company A indemnifies Company B for Company B's own negligence. See *Singleton v. Crown Cent. Petroleum Corp.*, 729 S.W.2d 690 (Tex. 1987)(actually a pre-*Ethyl* opinion); see generally Greta Haidinyak, *Interpretation of Indemnity Contracts: Texas Supreme Court Rejects the Clear and Unequivocal Language Standard in Favor of the Express Negligence Doctrine, Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987), 29 S. Tex. L. Rev. 445 (1987); Jeanmarie B. Tade, *Post-Ethyl Indemnity Law - The Express Negligence Doctrine Applied*, THE HOUSTON LAWYER, Nov.-Dec. 1989, at 34.

a. Examples of Indemnity Agreements

Although a determination of whether certain indemnity language satisfies the express negligence rule must be made on a case-by-case basis, some examples of provisions that passed and failed the *Ethyl*

test may be helpful. Take for instance the following language from *Payne & Keller vs. P.P.G. Industries, Inc.*, 793 S.W.2d 945 (Tex. 1990):

... arising out of . . . the acts or omissions . . . of [Payne & Keller] or its . . . employees . . . in the performance of the work . . . irrespective of whether [P.P.G.] was concurrently negligent . . . but excepting where the injury or death . . . was caused by the sole negligence of [P.P.G.].

The supreme court held this language satisfied the express negligence test.

In upholding the enforceability of the following indemnity agreement, the supreme court found a clear expression of the parties' intent to exculpate the indemnitee, ARCO, for ARCO's own negligence:

CONTRACTOR [PPI] agrees to hold harmless and unconditionally indemnify COMPANY [ARCO] against and for all liability, costs, expenses, claims and damages which [ARCO] may at any time suffer or sustain or become liable for by any reason of any accidents, damages or injuries either to the persons or property or both, of [PPI], or of the workman of either party, or of any other parties, or to the property of the [ARCO], in any matter arising from the work performed hereunder, including but not limited to any negligent act or omission of [ARCO], its officers, agents or employees . . .

Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724, 724, 726 (Tex. 1989) (sometimes referred to herein as *ARCO v. Petroleum Personnel*; emphasis deleted).

A year after *ARCO v. Petroleum Personnel*, the Texas Supreme Court found the following indemnity language sufficient to meet the express negligence rule:

[Christie] assumes entire responsibility and liability for any claims or actions based on or arising out of injuries, including death, to persons or damages to or destruction of property, sustained or alleged to have been sustained in connection with or to have arisen out of or incidental to the performance of this contract by [Christie], its agents and employees and its subcontractors, their agents and employees, regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Enserch], [Enserch's] representative, or the employees, agents, invitees, or licensees thereof.

Enserch Corp. v. Parker, 794 S.W.2d 2, 6-7 (Tex. 1990). Once again, the court found that the contract, as a whole, sufficiently defined the parties' intent that the contractor indemnify Enserch for the consequences of Enserch's own negligence.

Another example of an indemnity agreement upheld by a court comes from a recent decision by the San Antonio Court of Appeals:

(a) To fully and unconditionally protect, indemnify and defend [Price], its officers, agents and employees, and hold it harmless from and against any and all costs,

expenses, reasonable attorneys fees, claims, suits, losses or liability for injuries to property, injuries to persons (including subcontractor's employees), including death, and from any other costs, expenses, reasonable attorney fees, claims, suits, losses or liabilities of any and every nature whatsoever arising in any manner, directly or indirectly, out of or in connection with or in the course of or incidental to, any of subcontractor's work or operations hereunder or in connection herewith, regardless of cause or of the sole, joint, comparative or concurrent negligence or gross negligence of [Price], its officers, agents or employees.

Banner & Barricade, Inc. v. Price Constr., Inc., 94 S.W.3d 692 (Tex. App. - San Antonio, Oct. 23, 2002, no pet. h.).

Although some of the indemnity agreements quoted above were upheld, no one should merely copy those indemnity agreements into another agreement. The full circumstances of the agreement must be carefully considered. Moreover, approval of those agreements quoted above, occurred prior to the Texas Supreme Court's ruling in *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway*, which is discussed below.

An example of an indemnity agreement that failed the express negligence test is *Gulf Coast Masonry, Inc. vs. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987), which dealt with the following language:

Contractor agrees to indemnify and save owner harmless from any and all loss sustained by owner . . . from any liability or expense on account of property

damage or personal injury . . . sustained or alleged to have been sustained by any person or persons . . . arising out of . . . the performance or nonperformance of work hereunder by contractor . . . or by any act or omission of contractor, its subcontractors, and their respective employees and agents while on owner's premises.

As can be seen from the foregoing cases, in order for an indemnity agreement to be valid, it must state clearly and unequivocally that one party gets indemnity for the consequences of its own negligence from the other party. Any attempt to "hide the ball" on that key provision will jeopardize the validity of the indemnity agreement. Moreover, even though the express negligence rule requires use of the word "negligence" only, it is a good idea to include references to any other legal theory or breach of duty, such as products liability, that is to be the subject of the indemnity agreement.

3. Tying an Indemnity to Work Performed under a Contract

Courts construe indemnity agreements so strictly at times, that the result may seem unfair. In *Westinghouse Electric Corp. v. Childs-Bellows*, 352 S.W.2d 806 (Tex. App. - Fort Worth 1961, writ ref'd) (hereinafter referred to and cited as *Westinghouse v. Childs-Bellows*), Westinghouse was a subcontractor hired by the general contractor, Childs-Bellows. Westinghouse was to install elevators, and its contract obligated it to indemnify Childs-Bellows for injuries to Westinghouse employees arising out of the work to be performed, that is, the installation of the elevators.

The accident happened when the general contractor's employees, in work

separate from installing the elevators, committed acts of negligence that resulted in injury to the subcontractor's employees while they were engaged in installing the elevators. The court ruled that the indemnity did not apply because the accident did not result from work to be performed under the contract between Westinghouse and Childs-Bellows:

The injuries sustained by the Westinghouse employees were not injuries growing out of any work undertaken by Westinghouse but, according to the stipulations, were due solely to the negligence of employees of the general contractor, Childs-Bellows, in work which in so far as the stipulations show had no connection whatever with the installation of elevators, and work with which Westinghouse had no connection.

Id. at 808. See also *Brown & Root, Inc. v. Serv. Painting Co. of Beaumont*, 437 S.W.2d 630 (Tex. App. - Beaumont 1969, writ ref'd) (painter killed when object he was painting fell on him; accident caused by negligent acts of the general contractor's employees unrelated to painting; held not "in connection with" work); *Sun Oil Co. v. Renshaw Well Serv., Inc.*, 571 S.W.2d 64 (Tex. App. - Tyler 1978, writ ref'd n.r.e.) (well service employee injured in wreck when returning from completion of his job, resulting from negligent maintenance of the access road by the indemnitee, held not "in connection with" the work of the indemnitor); cf. *Spence & Howe Constr. Co. v. Gulf Oil Corp.*, 365 S.W.2d 631, 635-37 (Tex. 1963) (distinguishing *Westinghouse v. Childs-Bellows*. Because, on the facts of that case, the accident did arise out of the contractual work).

Westinghouse v. Childs-Bellows was decided over 40 years ago, and there is no recent case law applying its principles. Nevertheless, a party seeking indemnity should seek to avoid tying an indemnity to the work performed under the contract. An alternative would be to condition the indemnity on more defined events, such as injuries that (1) occur during the contract, or (2) happen at a certain location, or (3) affect certain persons. Another alternative is to use such phrases as "arising directly or indirectly" from the work or from the conduct of certain persons during the term of the agreement. See, e.g., *Amoco Chems. Corp. v. Sutton*, 551 S.W.2d 459 (Tex. App. - Eastland 1977, writ ref'd n.r.e.) (scope of indemnity expanded when it was to apply to injuries arising "directly or indirectly" out of the work to be performed).

4. The Requirement of Conspicuousness

In *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505 (Tex. 1993) (hereinafter referred to and cited as *Dresser v. Page*), the Texas Supreme Court continued the long-standing tradition of strict construction against indemnity agreements as well as the court's penchant for requiring indemnity agreements to be clear and unequivocal. The selection of words was not the issue in *Dresser v. Page*, but instead the question was conspicuousness.

In that case, the Texas Supreme Court ruled that the standard for conspicuousness in Texas Business and Commerce Code §1.201(10), the Texas UCC, applied to indemnity agreements. That provision of the Texas UCC reads as follows:

- (a) "Conspicuous": A term or clause is conspicuous when it is so written

that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: Non-Negotiable Bill of Lading) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

Tex. Bus. & Comm. Code Ann. §1.201(1) (Vernon Supp. 2003).

In adopting the standard for conspicuousness contained in the UCC for indemnity agreements and releases, the Texas court referred to the UCC's own examples of headings, contrasting type, contrasting color, and the length of the document in which the indemnity or release is contained. *See Dresser v. Page*, 853 S.W.2d at 508. After *Dresser v. Page*, conspicuousness became to be seen as one part of a general "fair notice" requirement that comprehends *Ethyl*'s express negligence test and *Dresser v. Page*'s requirement of conspicuousness.

a. What Makes a Contract Conspicuous

There is no hard and fast rule that says what is conspicuous and what is not. In the context of forms, such as invoices and purchase orders, the size and color of type is very important. Thus, a "clause is conspicuous if it has language in capital headings, or has language in contrasting type color." *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 378 (Tex. App. - Houston [14th Dist.] 2000, orig. proceeding); *accord Littlefield v. Schaefer*, 955 S.W.2d 272, 274 (Tex. 1997) (referring to capital letters and contrasting type). An indemnity that is on the reverse side of a purchase order in fine print is simply not conspicuous. The client

may well respond to such a legal opinion with: "But no one will sign the agreement if I put it in bold print on the front of the purchase order!" That is, of course, the whole point of the conspicuousness requirement.

It is probably not necessary to put the entire indemnity agreement on the front of the purchase order. Often, the full agreement is contained on the back of the purchase order under the heading "terms and conditions." At the least, however, the purchase order should be in bold and/or contrasting print stating that the purchase order is subject to the terms and conditions on the reverse side, specifically including the seller's indemnity of the buyer for the buyer's own negligence, or vice versa.

It probably would have been better if *Dresser v. Page* had limited its holding to the UCC battle of forms. There is no such limitation in the opinion. *See Douglas Cablevision IV, L.P. v. Southwestern Elec. Power Co.*, 992 S.W.2d 503, 507 (Tex. App. - Texarkana 1999, pet. denied) (finding no support for argument that *Dresser v. Page* applies only to form contracts). Thus, the requirement of conspicuousness apparently applies to negotiated contracts as well as to pre-printed forms. Negotiated contracts, of course, tend to be long. The longer a document is, the more conspicuous the indemnity must be.

b. The Actual Knowledge Defense

The conspicuousness requirement is not operative, however, if there is proof that the indemnifying party had actual knowledge of the provision. *See Cate v. Dover Corp.*, 790 S.W.2d 559, 561 (Tex. 1990); *Dresser v. Page*, 853 S.W.2d at 508, n.2; *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 20 S.W.3d 119, 126 (Tex. App. - Houston [14th Dist.] 2000, no pet.).

One way to prove actual knowledge is to have the indemnifying party initial every place where the indemnity obligation appears. That is good in theory, but what if a page is inadvertently not initialed? In that situation, there may be a danger that a proper and conspicuous indemnity agreement could be negated by the absence of initials. In preparing indemnity agreements, the lawyer should always take into account the real-world conditions under which the indemnity is to be signed.

The effect of actual knowledge has been grossly exaggerated, in dicta, by two courts of appeals. *See Mo.-Pac. R.R. Co. v. Lely Dev. Corp.*, No. 03-01-00552-CV, 2002 WL 1993508, at *2 & n.2 (Tex. App. - Austin, Aug. 30, 2002, no pet. h.) (not yet reported); *Reyes v. Storage & Processors, Inc.*, 86 S.W.3d 344, n.1 (Tex. App. - Texarkana 2002, no pet. h.) (also discussing whether ratification can make an otherwise-invalid indemnity agreement enforceable). Those opinions suggested that the actual knowledge exception applies to both aspects of fair notice - the express negligence and conspicuousness. *Id.* That cannot be the law. Obviously, if a party has actual knowledge that an indemnity does not meet the *Ethyl* express negligence test, a party knows that the indemnity is no good. One court has so held. *See DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880, 885 (Tex. App. - Houston [14th Dist.] 2001, no pet.).

5. Legal Fees

The fair-notice requirements of *Ethyl* and *Dresser v. Page* probably have reduced litigation over indemnity agreements. From time to time, however, there are counter-developments that threaten certainty in indemnity law. For example, at one time, a few courts of appeals began to hold that an indemnity agreement invalid under *Ethyl*

could nevertheless require one party to indemnify the other for legal fees incurred in defending against a lawsuit for damages within the scope of the indemnity agreement. *See, e.g., R. L. Jones Co. v. City of San Antonio*, 809 S.W.2d 565, 567-68 (Tex. App. - San Antonio 1991, no writ); *Champlin Petroleum Co. v. Goldston Corp.*, 797 S.W.2d 165, 166-67 (Tex. App. - Corpus Christi 1990, writ denied). *See generally* James R. Bailey & William J. Boyce, *Indemnity Agreements, Release, and Additional Insurance Provisions*, Hous. LAWYER, Mar./Apr. 1996, at 34.

The Texas Supreme Court quelled that rebellious line of cases in *Fisk Electric Co. v. Constructors & Associates, Inc.*, 888 S.W.2d 813 (Tex. 1994). Speaking for a unanimous Court, Justice Enoch stated that, if an indemnity agreement does not meet the *Ethyl* test, it is simply good for nothing. *Fisk* also overruled a number of cases holding that the express negligence test does not apply absent a finding that the indemnified party was negligent. *See id.* at 815. *See generally Douglas Cablevision IV, L.P. v. Southwestern Elec. Power Co.*, 992 S.W.2d 503, 510 (Tex. App. - Texarkana 1999, pet. denied) (discussing the effect of *Fisk* on Texas law).

6. Theories of Liability Other than Negligence

When indemnity agreements are discussed, the concept of indemnity for one's own negligence is the usual topic with respect to shifting liability for the consequences of one's conduct. There are other breaches of duty whose consequences can also be shifted by indemnity agreements. They include breach of warranty, breach of contract, and strict liability.

One issue that arose after the *Ethyl* decision was whether an indemnity was required to specifically address claims brought under theories other than negligence. In the earlier discussed opinion of *ARCO v. Petroleum Personnel*, 768 S.W.2d 724 (Tex. 1989), the court held that it was not necessary to specify “the kind, character or degree of negligence that is to be indemnified against.” 768 S.W.2d at 726. That holding could have been viewed as supporting the argument that other forms of liability or theories of recovery need not be specified. Further, in *ARCO v. Petroleum Personnel*, the court said in a footnote that it would not decide the validity of indemnifying a party from its own gross negligence because the parties had not briefed that issue. 768 S.W.2d at 726, n.2.

The provision in *ARCO v. Petroleum Personnel* did not refer specifically to “gross negligence,” but the court’s discussion of gross negligence indicates that the court felt that gross negligence was within the scope of the indemnity nevertheless. That was another indication that the drafter of an indemnity might not need to specify each type of cause of action that is within the indemnity’s scope. *Accord Webb v. Lawson-Avila Constr., Inc.*, 911 S.W.2d 457, 461 (Tex. App. - San Antonio 1995, writ dism’d) (discussing *ARCO v. Petroleum Personnel* and holding that gross negligence is just one of the “shades” of negligence); but see *Crown Cent. Petroleum Corp. v. Jennings*, 727 S.W.2d 739, 742 (Tex. App. - Houston [1st Dist.] 1987, no writ) (indemnity did not cover exemplary damages, since they were not mentioned in provision).

Nevertheless, the safer course has always been to specify each type of liability that is within the indemnity. If that is done, no argument can exist about the scope of the indemnity. Supporting that safer strategy is

the Texas Supreme Court’s decision in *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Railway*, 890 S.W.2d 455 (Tex. 1994) (hereinafter referred to and cited as *HL&P v. Santa Fe Railway*).

In *HL&P v. Santa Fe Railway*, the Texas Supreme Court held that an indemnity clause does not protect against strict liability unless it specifically refers to strict liability. The strict liability cause of action at issue in that case was not a products liability cause of action but a claim under the federal Safety Appliance Act; but the court did in fact discuss products liability, so that one can safely assume that indemnity for products liability must likewise be expressed in so many words. In reaching its decision, the supreme court used the new phrase, “express intent” rule. The court further reiterated its decision in *Ethyl* that any “intent” to have comparative indemnity must be “expressly” stated.

One might perceive some tension between the supreme court’s holding in *ARCO v. Petroleum Personnel* and the requirement of express intent for comparative indemnity in *Ethyl* and *HL&P v. Santa Fe Railway*, but there is none. In *ARCO v. Petroleum Personnel*, the court said that the failure to discuss the concepts of comparative and sole indemnity did not invalidate an otherwise valid indemnity, while in *Ethyl* and *HL&P v. Santa Fe Railway*, the court said if you want comparative indemnity, you must expressly say so. In other words, if the agreement is silent on comparative indemnity but otherwise complies with the “express negligence” or “express intent” rule, the agreement is valid but not to the extent of granting any unspecified comparative result. Thus, any drafter of an indemnity provision should be specific as to the types of causes of action that are being indemnified against.

At the same time, however, it is not absolutely clear under Texas law that the “express intent” rule applies to any and all claims, particularly if those claims sound more in contract than in tort. *See generally Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794, 806 (Tex. 1992) (declining to extend the express negligence rule to a separate additional-insured provision that applies regardless of any indemnity provision); *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997) (concerning a no-damages for delay clause); *Transcontinental Gas Pipeline Corp. v. Texaco, Inc.*, 35 S.W.3d 658, 669 (Tex. App. - Houston [1st Dist.] 2000, pet. denied) (noting that express negligence does not apply to all ambiguous indemnity provisions); *Polley v. Odom*, 957 S.W.2d 932, 935-37 (Tex. App. - Waco 1997) (discussing the types of agreements governed by the express negligence rule), *judgm't vacated by settlement but opinion retained*, 963 S.W.2d 917 (Tex. App. - Waco 1998, no pet.). As a drafter of an indemnity agreement, however, it is better to assume that the express negligence or express intent rule applies to all claims.

7. Indemnity for Gross Negligence

It is not clear whether Texas law allows indemnity agreements to shift liability for exemplary damages. The current answer is “maybe.” An analysis of that issue begins with cases concerning a different type of agreement - a release or exculpatory agreement.

A release agreement for prospective conduct between two parties may be invalid to the extent that it covers gross negligence. That was the holding in *Smith v. Golden Triangle Raceway*, 708 S.W.2d 574 (Tex. App. - Beaumont 1986, no writ) (hereinafter referred to and cited as *Golden Triangle Raceway*). In that case, the court upheld an

anticipatory release of claims arising from negligence but did not uphold the anticipatory release as to gross negligence. In that case, a spectator obtained a pit pass allowing him to go into the racing pit. The pit pass said that the spectator released the raceway from all claims for injuries whether predicated on negligence or gross negligence. The court upheld the release as to the negligence claim but not as to the gross negligence claim.

Appearing to support the holding in *Golden Triangle Raceway* is the supreme court’s decision in *Memorial Medical Center v. Keszler*, 943 S.W.2d 433, 435 (Tex. 1997) (hereinafter referred to and cited as *Keszler*). In *Keszler*, the court actually declined to apply the holding in the *Golden Triangle Raceway* case to post-injury releases, but the supreme court’s opinion implies approval of the *Golden Triangle Raceway* opinion when a pre-injury release is at issue.³

Completely agreeing with the holding in *Golden Triangle Raceway* is the Fourteenth Court of Appeals’ unreported opinion in *Rosen v. National Hot Rod Association*, No. 14-94-00775-CV, 1995 WL 755712, at *7 n.1 (Tex. App. - Houston [14th Dist.] Dec. 21, 1995, writ denied). The *Rosen* court noted an opposite holding by the Fourth Court of Appeals in *Newman v. Tropical Visions, Inc.*, 891 S.W.2d 713,

³ *See also Webb v. Lawson-Avila Constr., Inc.*, 911 S.W.2d 457, 461 (Tex. App. - San Antonio 1995, writ dism'd) (justifying interpretation of indemnity meeting express “negligence” test as providing protection from exemplary damages, because “gross negligence” is merely one of the “shades” of “negligence”). Arguably, “malice” is not a shade of negligence. *See also Hartford Cas. Ins. Co. v. Powell*, 19 F. Supp. 2d 678, 696 (N.D. Tex. 1998) (holding that public policy prohibits insurance protection for exemplary damages resulting from malice).

722 (Tex. App. - San Antonio 1994, writ denied).

It is not at all clear whether the prohibition against a release for injuries caused by a party's gross negligence also means that indemnity agreements cannot protect against gross negligence. In *ARCO v. Petroleum Personnel*, the Texas Supreme Court said:

We do not decide whether indemnity for one's own gross negligence or intentional injury may be contracted for or awarded by Texas courts. This issue is not presented in this appeal from a summary judgment. Public policy concerns are presented by such an issue that have not been argued or briefed by the parties.

768 S.W.2d at 726, n.2.

On the other hand, Texas courts of appeals have held that insurance policies may provide coverage for exemplary damages arising from grossly negligent conduct. *Am. Home Assurance Co. v. Safeway Steel Prods. Co., Div. of Figgie Int'l, Inc.*, 743 S.W.2d 693 (Tex. App. - Austin 1987, writ denied); *Home Indem. Co. v. Tyler*, 522 S.W.2d 594 (Tex. Civ. App. - Houston [14th Dist.] 1975, writ ref'd n.r.e.); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341 (Tex. Civ. App. - Fort Worth 1972, writ ref'd n.r.e.); *Ridgeway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978) (interpreting Texas law to allow insurance for exemplary damages). One federal district court, however, had made an *Erie* guess that the Texas Supreme Court would hold that insurance coverage for exemplary damages arising from "malice," as defined in chapter 41 of the Texas Civil Practice & Remedies Code, is not insurable for reasons of public policy. See *Hartford*

Cas. Ins. Co. v. Powell, 19 F. Supp. 2d 678, 696 (N.D. Tex. 1998). Amazingly, no Texas court has ever discussed or even cited that opinion to date.

The above-cited case of *Home Indemnity v. Tyler* dealt with an issue that is not settled under Texas law, namely, whether exemplary damages can be recovered from one's own uninsured or underinsured motorist policy. In *Vanderlinden v. United Services Automobile Association Property & Casualty Insurance Co.*, 885 S.W.2d 239 (Tex. App. - Texarkana Sept. 16, 1994, writ denied), another court held that there was no coverage for exemplary damages in a UM policy. The court's holding was based on the public policy that an insured should not be able to punish his own insurance company for the conduct of another motorist. The court said nothing to indicate an overall policy decision that exemplary damages should never be insurable. The debate on that issue remains. See *Milligan v. State Farm Mut. Auto. Ins. Co.*, 940 S.W.2d 228, 230-32 (Tex. App. - Houston [14th Dist.] 1997, writ denied).

In any event, given that insurance contracts are a form of indemnity contract, if public policy does not prohibit insuring against gross negligence then why should it prohibit private indemnity agreements on that subject?

Intermediate appellate courts have addressed the validity of indemnification of a party for its grossly negligent conduct. In *Valero Energy Corp. v. M.W. Kellogg Construction Co.*, 866 S.W.2d 252 (Tex. App. - Corpus Christi 1993, writ denied), the court squarely held that an "indemnity provision absolving [a party] of all liability sounding in products liability and gross negligence does not offend public policy." *Id.* at 258. Similarly, the San Antonio Court

of Appeals has upheld indemnity for gross negligence in *Webb v. Lawson-Avila Construction, Inc.*, 911 S.W.2d 457, 462 (Tex. App. - San Antonio 1995, writ dism'd).

Indemnity for exemplary damages probably had more support and more importance before the requirement of proof for exemplary damages was strengthened by the Texas Supreme Court in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), and 1995 Tort Reform. Under chapter 41 of the Texas Civil Practice & Remedies Code, exemplary damages are recoverable only on a showing of "malice" by clear and convincing evidence. There is a stronger argument that public policy bars indemnity for "malice" than there is for barring indemnity for the watered-down variety of gross negligence that resulted from the supreme court's decision in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981). Now that exemplary damages are usually recoverable for "malice" and for truly egregious conduct, there may be an inclination to put gross negligence outside the scope of indemnity.

In any event, because there is a question concerning the validity of an indemnity covering grossly negligent conduct, such an indemnity provision should have a survivability clause. A survivability clause states that, if any portion of the indemnity is invalid, then the remainder of the provision stays in full force and effect.

D. Indemnity May Be Affected by Statute

All contractual indemnity language that has been reviewed by courts needs to be evaluated against the statutory provisions discussed above, because a number of statutes may supersede indemnity rights set forth in contracts. Some of these statutes are

discussed below, the most significant of which is the Texas Deceptive Trade Practices Act.

1. Electric Companies

Electric companies and municipalities who own power lines benefit from a form of statutory indemnity provided by Tex. Health and Safety Code Ann. § 752.008 (Vernon 1992). As with contractual indemnity provisions, this statutory right to indemnify may also overcome the workers' compensation bar to recovery against the employer. See *Hernandez v. Houston Lighting & Power Co.*, 795 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1990, no writ); *Houston Lighting & Power Co. v. Eller Outdoor Advertising Co.*, 635 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.); *Edwards v. Shell Oil Co.*, 611 S.W.2d 904 (Tex. Civ. App.—Eastland 1981, writ ref'd n.r.e.).

2. Architects and Engineers

Only insurance companies may indemnify architects and engineers against acts of malpractice. Tex. Civ. Prac. & Rem. Code Ann. §§ 130.001-.005 (Vernon 1997). However, this statute does not prevent non-negligent architects from being indemnified by negligent contractors. *Foster, Henry, Henry, & Thorpe, Inc. v. J. T. Construction Co.*, 808 S.W.2d 139 (Tex. App.—El Paso 1991, writ denied).

3. Deceptive Trade Practices Act

Indemnity rights are available under the DTPA. "A person against whom an action has been brought" under the DTPA can assert all contribution or indemnity rights available under statutory or common law. See Tex. Bus. & Comm. Code Ann. §17.555 (Vernon 1987); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex.

1989); *Aviation Office of America, Inc. v. Alexander & Alexander of Texas, Inc.*, 751 S.W.2d 179, 180 (Tex. 1988).

If the person seeking indemnity is successful, §17.555 provides that he may recover “all sums that he is required to pay as a result of the action, his attorney’s fees reasonable in relation to the amount of work performed in maintaining his action for indemnity, and his costs.”

III. PROPORTIONATE RESPONSIBILITY

There are currently seven proportionate responsibility schemes under Texas law, six statutory and one based on case law. These seven schemes are:

(1) Tex. Civ. Prac. & Rem. Code §32.001 *et seq.*: The original contribution statute enacted in 1917;

(2) Tex. Civ. Prac. & Rem. Code §33.001 *et seq.* prior to the 1987 amendments: The comparative negligence statute enacted in 1973;

(3) Tex. Civ. Prac. & Rem. Code §33.001 *et seq.* after the 1987 amendments: The comparative responsibility statute enacted in 1987;

(4) *Duncan v. Cessna Aircraft Co.* 665 S.W.2d 414 (Tex. 1984): Common law contribution by comparative causation;

(5) Tex. Civ. Prac. & Rem. Code §33.001 *et seq.* after the 1995 amendments: the amendments to the comparative responsibility statute now known as the proportionate responsibility statute, effective September 1, 1995;

(6) Tex. Civ. Prac. & Rem. Code §33.001 *et seq.* after the 2003 amendments: the amendments to the comparative responsibility statute now known as the proportionate responsibility statute, effective July 1, 2003; and

(7) Tex. Civ. Prac. & Rem. Code §33.001 *et seq.* after the 2005 amendments: the amendments to the comparative responsibility statute now known as the proportionate responsibility statute, effective, June 9, 2005.

This paper will discuss the schemes applicable to cases filed after September 1, 1995.

A. What Proportionate Responsibility Law Applies

Determining which proportionate responsibility scheme applies to a particular case requires a three step process. First, counsel must determine the date upon which all or any part of the suit was filed. See Tex. Civ. Prac. & Rem. Code §33.001. Second, counsel must determine when the cause of action accrued. Third, counsel must determine the theories of liability adjudged by the trier of fact against the defendants.

If a tort cause of action accrues on or after September 1, 1995 or suit is first-filed on or after September 1, 1996 but before July 1, 2003, then the proportionate responsibility statute passed as part of the 1995 tort reform amendments will apply.

If a tort cause of action is first-filed on or after July 1, 2003 but before June 9, 2005 and the trial, re-trial or new trial begins

before June 9, 2005, then the proportionate responsibility statute passed as part of the 2003 tort reform amendments will apply.

If a tort cause of action is first-filed on or after June 9, 2005 or is pending and a trial, new trial, or re-trial begins on or after June 9, 2005, then the proportionate responsibility statute as amended by the 2005 Texas Legislature will apply.

The vast majority of negligence and products liability cases currently pending were likely filed after September 1, 1995. Therefore, almost all our analysis concerns issues raised following September 1, 1995.

B. 1995 Tort Reform - The Proportionate Responsibility Statute

The 1995 tort reform amendments made some notable changes regarding proportionate responsibility calculations and mechanics. The most notable are highlighted below:

1. Does the 1995 proportionate responsibility statute apply?

It is important first of all to determine what types of lawsuits are covered by Chapter 33. The Chapter's applicability is described in Section 33.002. The Chapter broadly applies to "any cause of action based on tort." That is expressed in subdivision (a) of Section 33.002, which replaced the 1987 version of subdivision (a) expressly providing that the Chapter did not apply to a claim based on intentional tort or a claim for exemplary damages. *See Harris v. Archer*, 134 S.W.3d 411, 435 (Tex. App. – Amarillo, 2004, pet. denied).

Chapter 33 contains express exclusions to its applicability. Chapter 33 does not apply to workers compensation

claims or to exemplary damages claims, including actions against an employer for exemplary damages arising out of an employee's death. Tex. Civ. Prac. & Rem. Code Ann. §33.002(c).

2. 51% Bar

The 1995 Proportionate Responsibility Statute enacted a 51% bar rule applicable to all cases falling within the statute. Tex. Civ. Prac. & Rem. Code §33.001. In other words, if the plaintiff is judged to be 51% at fault, any recovery is barred. The 60% bar rule for products liability cases was eliminated.

3. Joint and Several Liability

a. The primary rule: no joint liability unless more than 50% at fault

The Proportionate Responsibility Statute states that a defendant will be jointly and severally liable only if its percentage of responsibility is "greater than fifty percent." Tex. Civ. Prac. & Rem. Code §33.013(b). This rule was applied in conjunction with §33.012 in *Sugar Land Properties, Inc. v. Becnel*, 26 S.W.3d 113 (Tex. App. – Houston [1st Dist.] 2000, no pet.). In this case the plaintiff sued three defendants, two of which settled with the plaintiff for a total of \$12,500. *See Sugar Land Properties, Inc.*, 26 S.W.3d at 115. The case against the remaining defendant, Sugar Land, was tried to a jury. *See id.* After trial, a judgment was entered for \$52,730 with responsibility allocated as follows:

Settling Defendants 30%

Sugar Land 70%

The issue on appeal was “whether a defendant whose responsibility is greater than 50% is jointly and severally liable for the amount remaining after that defendant has received a dollar-for-dollar credit for all settlements.” *Id.* at 120. The court held that such a defendant is jointly and severally liable for the remaining amount basing its holding on the following language of §33.013(b):

Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if the percentage of responsibility attributed to the defendant is greater than 50 percent.

Id. at 119. As a result, the court held that Sugar Land was jointly and severally liable for the recoverable damages of \$40,230 (\$52,730 minus the \$12,500 dollar-for-dollar settlement credit) because the jury attributed more than 50% of the fault to Sugar Land. *See id.* at 121.

Note that given this threshold, there can only be *one* jointly and severally liable defendant in the case. For that defendant, the current rules of contribution apply. All of the other defendants need not be concerned with contribution because they will never pay more than their own share of fault as assessed by the trier of fact.

b. When joint liability still applies

There are exceptions to that second general rule, however. Joint and several liability is reintroduced if the defendant is more than 50% responsible for the occurrence in question. In addition, joint and several liability is reintroduced if (1) the defendant is 15% or more responsible for

the occurrence, and (2) the claimant's personal injury, property damage, death, or other harm, (a) is caused by the depositing, discharging, or releasing into the environment of any hazardous or harmful substance as described in §33.011(7), or (b) resulted from a toxic tort. Further, joint and several liability is imposed upon any defendant “who, with the specific intent to do harm to others, acts in concert with another person to engage in” certain criminal conduct, namely the following:

Murder

Capital murder

Aggravated kidnapping

Aggravated assault

Sexual assault

Aggravated sexual assault

Injury to a child, elderly individual, or disabled individual

Forgery

Commercial bribery

Misapplication of fiduciary property or property of financial institution

Securing execution of document by deception

Fraudulent destruction, removal, or concealment of writing; or

Conduct described in Chapter 31 of the Penal Code the punishment level for which is a felony of the third degree or higher.

See Texas Penal Code §§19.02, 19.03, 20.04, 22.02, 22.011, 22.021, 22.04, 32.21, 32.43, 32.45, 32.46, & 32.46. The delineated criminal conduct parallels that outlined in the new punitive damages statute, except for intoxication assault and intoxication manslaughter.

The "intent to do harm" language quoted above is specifically defined by Chapter 33 to apply when it is the person's conscious effort or desire to engage in such conduct for purpose of doing substantial harm to others." Tex. Civ. Prac. & Rem. Code Ann. §33.002(e).

In order to fall within the criminal acts exception, a defendant's conduct must include "specific intent to do harm to others" before this exception applies, Penal Code provisions to the contrary notwithstanding. (Section 33.002(b) and (d).) "Intent to do harm" means it is the actor's "conscious effort or desire to engage in [the defined] conduct for the purpose of doing harm to others[,] with respect to the nature and result of that conduct. (Section 33.002(e).) The actors, however, are jointly liable only for the "legally recoverable" damages proximately caused by the conduct. (Section 33.002(b).).

Chapter 33 precludes the jury from knowing that the conduct to which the exception applies is defined by the Penal Code. (Section 33.002(g).) And no jury submission regarding conduct is mandated unless "sufficient evidence" supports the submission. (Section 33.002(f).)

4. Responsible Third Parties

The proportionate responsibility statute includes a new term, "the responsible third party." A responsible third party is a defendant who is joined by means of a

timely motion filed by an existing defendant in the case. Section 33.004 allows any defendant to join the responsible third party who has not been sued by the claimant. The joinder must occur prior to the expiration of limitations of the claimant's cause of action for damages. Moreover, a third party claim allowed by §33.004 may be filed even though limitations has expired, if the third party claim is filed on or before 30 days after the date of the defendant's answer is required to be filed. That period of extension does not exist if the limitations period governing the claimant's action against the defendant joining the responsible third party is longer than the limitations period governing the claimant's action against the responsible third party.

This term of "responsible third party" is further defined in the statute. The term means any person to whom all of the following apply:

The court in which the action was filed could exercise jurisdiction over the person;

The person could have been, but was not, sued by the claimant; and

The person is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant or defendants.

At the same time, a responsible third party cannot be:

The claimant's employer, if the employer maintains workers compensation insurance coverage;

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 funding may be available to pay claims asserted against the debtor; or

A seller eligible for indemnity under §82.002 as an innocent retailer unless there is alleged against the seller a claim for relief based on the seller's negligence, intentional misconduct, or other act or omission, such as negligently by modifying or altering a product, for which the seller is independently liable to the claimant.

On timely motion, a defendant may join a "responsible third party" any time before the statute of limitations applicable to the claimant's claim expires or thirty days after the defendant's answer is due, whichever is later. (Section 33.004(a) and (d).) No later than sixty days after the defendant's third-party claim is filed, the claimant who "seeks to" also can join the responsible third party, even if the claim would be otherwise time-barred. (Section 33.004(e).) The phrase "seeks to join" is not defined.

The 1995 statute does not define the "timely motion" that the defendant must file to join the third party. The statute does not mandate that the court grant the motion, either. Thus, the cautious lawyer will determine as soon as possible after answer whether a third-party claim is appropriate.

It is not clear what §33.004 adds to the law since it provides in subdivision (b) that it is not intended to affect third party practice as previously recognized in the rules and statutes of the state with regard to

the assertion by defendant of rights to contribution or indemnity.

One commentator who has addressed this issue has opined that "in reality, this is nothing more than recognizing the practice of adding third-party defendants to a suit in the context of the joint and several liability statute." See Gallagher, *Legislative Update: Joint and Several Liability, The University of Texas School of Law 19th Annual Page Keeton Products Liability and Personal Injury Law Conference* (1995). Other procedure experts believe, however, that Section 33.004 actually expands permissible third party practice to include all potential tortfeasors.

Under current law, despite some language in Civil Procedure Rule 38 [T.R.C.P. 38] that suggests otherwise, a defendant probably may not join a third-party defendant merely because of that person's potential liability to the plaintiff. (See *Williams v. Ballard*, 722 S.W.2d 9, 11 (Tex. App. - Dallas 1986, no writ) ("Does a defendant have a right to demand that plaintiff add additional parties in order that plaintiff may obtain complete relief? We think not.").

Dorsaneo and Zwalenburg, *C.P.R.C. Ch. 33 Rewritten: Limits on Plaintiff's Recoveries: Proportionate Responsibility; Responsible Third-Parties; Protections for Property Owners*, Texas Torts Update, Vol. 1995, Issue No. 8, p. 212.

The most significant change in Texas practice created by Section 33.004, however, most likely will involve the way in which the issues of comparative responsibility are submitted to the trier of fact. Currently, if third-party defendants are involved in a

lawsuit, the only fault that is submitted to the jury in the first set of jury questions is that of the plaintiff(s), any settling party or parties, and the defendant(s) from whom the plaintiff(s) is (are) seeking relief at the time of submission. If the defendant(s) is (are) found liable, it is only at that time that the fault of the third-party (or contribution) defendant(s) is apportioned as against the liable defendant(s). Section 33.003 expressly provides, however, that the trier of fact shall determine the percentage of responsibility for a given occurrence of all of the following:

- (1) each claimant;
- (2) each defendant;
- (3) each settling person; and
- (4) each responsible third-party who has been joined under Section 33.004.

Tex. Civ. Prac. & Rem. Code §33.003 (emphasis added); *see also Joint and Several Liability: Hearings on Tex. S.B. 28, before the Senate Comm. on Econ. Develop.*, 74th Leg., R.S. 55-67 (February 28, 1995).

The result is that defendants will have increased incentive to join through third-party action "responsible third-parties" to reduce their share of potential responsibility before the jury.

5. Settlements & Credits

The above provisions on joint and several liability deal, of course, with the situation of a case that is tried to a jury. Chapter 33 further addresses the impact of settlements. As mentioned above, any settling defendant must still be submitted to the jury for determination of percentage of responsibility. The more important issue as to settling parties is how the remaining defendant or defendants can take a credit for

settlements. Credit for settlements can occur in one of two ways:

- The sum of the dollar amount of all settlements; or
- A dollar amount equal to the sum of the following percentage of damages bound by the trier of fact:
 - a. 5% of those damages up to \$200,000;
 - b. 10% of those damages from \$200,001 to \$400,000;
 - c. 15% of those damages from \$400,001 to \$500,000; and
 - d. 20% of those damages greater than \$500,000.

The sliding scale shown above is identical to the sliding scale originally enacted in 1987.

If a claimant has settled with one or more defendants, an election must be made as to which dollar credit is to be applied under §33.012(b). This election shall be made by any defendant following a written election before the issues of the action are submitted to the trier of fact and, when made, should be binding on all defendants. If no defendant makes the election, or if conflicting elections are made, then all defendants are considered to have elected the sliding scale that is contained in subdivision (2) of §33.012(b).

6. Summary of 1995 Proportionate Responsibility

Here are the main rules under the statute:

- The trier of fact must determine the percentage of responsibility, stated in whole numbers, for each claimant, defendant, settling person, and responsible third party that cause[s] or contribute[s] to cause 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. (Section 33.033.)
- If the claimant is not barred from recovery, benefits paid under workers' compensation insurance coverage shall not reduce the award of damages. (Section 33.012(d).)
- Existing indemnity law remains largely unaffected. (Section 33.017.)
- The claimant is barred from recovery in all cases in which the percentage of responsibility is greater than 50%. (Section 33.001.) (The claimant's bar under the 1987 statute is 51% in negligence cases and 60% in products cases.)
- A defendant must be 51% or more responsible to become jointly liable for damages. A defendant will be jointly and severally liable only if its percentage of responsibility is 51% or more ("greater than 50%"). (Section 33.013(b).) For that defendant, the current rules of contribution apply. Most other defendants need not be concerned with contribution because they will never pay more than their own share of fault.
- A defendant's threshold for joint and several liability in environmental pollution or toxic tort cases C including claims involving exposure to workplace substances

C is 15%. (Sections 33.011(7) and 33.013(c).)

C. 2003 Tort Reform

The Texas Legislature, once again, made significant changes to the Proportionate Responsibility Statute. Many aspects of the 1995 Proportionate Responsibility Statute still remain. Instead of restating all the rules recited in the prior portions of this paper, this section will only discuss how the 2003 amendments change the prior law. Accordingly, in order to gain a complete understanding of all Proportionate Responsibility rules, one must review the paper in its entirety.

1. Does the 2003 Proportionate Responsibility Statute Apply?

The 2003 amendments to the Proportionate Responsibility Statute apply to cases filed on or after July 1, 2003. Chapter 33 applies to "any cause of action based in tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." Tex. Civ. Prac. & Rem. Code §33.002(a)(1). In addition to "any cause of action based in tort," Chapter 33 also covers:

any action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought. Tex.

Civ. Prac. & Rem. Code
§33.002(a)(1).

2. Determination of Percentage of Responsibility

Section 33.003 dictates who and under what circumstances persons are included in the first set of jury questions dealing with the proportionment of responsibility. Prior to the 1995 amendments, the plaintiff exercised exclusive control over who was submitted in the proportionate responsibility question. In pre-1995 amendment cases, the only fault submitted to the jury in the first set of questions was that of: (1) the plaintiff; (2) any settling parties; and (3) the defendant(s) from whom the plaintiff was seeking relief at the time of the submission. Each of these parties made it to this first submission only through the exclusive actions of the plaintiff. If a defendant were found liable, it was only at that time that the fault of the third-party defendants was apportioned as against the liable defendant(s). This was done in a second jury question and dealt only with how the defendants contributed to the judgment as among themselves.

After the 1995 amendments, the plaintiff's right to control who was in the first jury submission was eliminated. In 1995, the legislature amended section 33.003 requiring the submission of the following persons in the first jury question:

- (1) each claimant;
- (2) each defendant;
- (3) each settling person; and
- (4) each responsible third-party who has been joined under Section 33.004.

With this amendment, the defendants could now join responsible third-parties and thereby dilute their percentage of responsibility to the extent that the jury accessed fault on the responsible third parties.

While the 1995 amendments allowed for the defendants to join responsible third parties, there were certain limitations as previously discussed in this paper. The 2003 amendments erode most of the limitations previously in place under the 1995 Proportionate Responsibility statute. Those significant changes are discussed below.

3. Responsible Third Parties

The 2003 amendments to section 33.004 significantly change the requirements and procedure for designating responsible third parties.

a. Joinder is No Longer Required, Just Designation

Under the 2003 amendments, joinder in the case is no longer required, just designation. *See Bueno v. Cott Beverages*, 2005 W.L. 647026 (W.D. Tex., Feb. 8, 2005) (allowing designation under 2003 statutes after deadline to join additional parties).

Prior to the 2003 amendments, a defendant who wanted to include a responsible third party in the proportionate responsibility jury question had to "join" the person or entity as a party to the lawsuit. The 2003 amendments replace the word "join" with the word "designate." Tex. Civ. Prac. & Rem. Code §33.004(a).

Section 33.004(a) used to read:

Except as provided in Subsections (d) and (e), prior to the expiration of limitations on the claimant's claim for damages against the defendant and on timely motion made for that purpose, a defendant may seek to join a responsible third party who has not been sued by the claimant.

The 2003 amendments change section 33.004(a) to now read:

A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

Tex. Civ. Prac. & Rem. Code §33.004(a) as amended by HB4.

Now, a defendant can add a person into the proportionate responsibility question who is not "joined" as a party and may never have to pay a judgment to the plaintiff or contribution to the defendant. Further, the designation of a person as a responsible third party or the finding of fault by a jury as to that responsible third party (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. Tex. Civ. Prac. & Rem. Code §33.004(i)(1) and (i)(2) as amended by HB4.

b. File the Motion to Designate Anytime On or Before the 60th Day Before Trial

The 1995 version of section 33.004(a) required a defendant seeking to join a responsible third party to do so by a "timely motion made for that purpose." Tex. Civ. Prac. & Rem. Code §33.002(a)(1). "Timely motion" was not further defined and there has been no interpretative case law.

The 2003 amendments to section 33.004(a), now specifically prescribe: "The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date." Tex. Civ. Prac. & Rem. Code §33.004(a) as amended by HB4. But see section "g" below for the time limitations associated with designating an unknown person who allegedly committed a criminal act as a responsible third party

c. The Motion to Designate May be Filed After Limitations

Under the 1995 amendments, a defendant could only join a responsible third party before the statute of limitations applicable to the claimant's claim expired or thirty days after the defendant's answer was due, whichever is later. Tex. Civ. Prac. & Rem. Code §33.004(d). Thereafter, the claimant, even though the claim would be otherwise barred by limitations, would be allowed to join the responsible third-party not later than 60 days after the third party claim was filed. Thus, under the 1995 Statute, most parties to a lawsuit would be brought into the case within 60 days after the expirations of limitations. In a typical tort case, the parties would be in the suit within 2 years and 60 days from the date of the incident.

The 2003 amendments no longer limit the defendants to designating responsible third parties within the claimant's limitations period or within 30

days after that defendant's answer date. Under the 2003 amendments, a defendant can designate a responsible third party at any time on or before 60 days prior to the trial date, and even beyond with a showing of good cause. Tex. Civ. Prac. & Rem. Code §33.004(a) as amended by HB4. Like the 1995 amendments, the 2003 amendments contain a savings provision that allows the claimant to join the designated responsible third party, even though limitations would otherwise bar the claim. However, the claimant must join the responsible third party not later than 60 days after that person is designated as a responsible third party by a defendant. Tex. Civ. Prac. & Rem. Code §33.004(e) as amended by HB4. In a protracted litigation, persons can now be added as parties to a lawsuit years beyond the expiration of the limitations period.

d. Objecting to the Designation of a Responsible Third Party

A court shall grant leave to designate, unless another party files an objection on or before the 15th day after the motion to designate was served. Tex. Civ. Prac. & Rem. Code §33.004(f) as amended by HB4. Thus, the trial court appears to have no discretion to deny the designation of a responsible third party in most instances. The court may deny the motion for designation only when an objecting party shows:

(1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure; and

(2) after having been granted leave to replead, 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.

Tex. Civ. Prac. & Rem. Code §33.004(g) as amended by HB4.

Given the liberal pleading requirements of the Texas Rules of Civil Procedure, almost all timely motions to designate will be granted. *See also Bueno*, 2005 W.L. 647026 (factual allegations satisfied statute).

e. Responsible Third Party Does Not Include a Seller Eligible for Indemnity under Chapter 82.

There is no change in the law in this regard. A defendant may still not designate a seller eligible for indemnity under chapter 82 as a responsible third party. Tex. Civ. Prac. & Rem. Code §33.004(c).

f. The Responsible Third Party Can Be a Person Over Whom the Court Has No Jurisdiction and Whom May Not Even Be Liable to the Plaintiff.

Under the 1995 amendments, a responsible third party had to be a person to whom all of the following apply:

1. The court in which the action was filed could exercise jurisdiction over the person;
2. The person could have been, but was not, sued by the claimant; and
3. The person is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant or defendants.

At the same time, under the 1995 amendments, a responsible third party could not be:

1. The claimant's employer, if the employer maintains workers' compensation insurance;
2. 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 funding may be available to pay claims asserted against the debtor; or
3. A seller eligible for indemnity under chapter 82.

Tex. Civ. Prac. & Rem. Code §33.011(6).

The basic premise of the 1995 amendments was to allow the defendants to join a party that would otherwise be responsible to the plaintiff, but the plaintiff chose not to sue for one reason or another. The parties who could be joined as responsible third parties were limited to those persons, who in essence, could or would have to pay a judgment to the plaintiff. The 1995 amendments also moved the responsible third party into the first proportionate responsibility jury question, thereby potentially benefiting defendants with diluted percentages of responsibility.

The 2003 amendments, eliminate all of the limitations on who could be a responsible third party, except as to a seller eligible for indemnity under Chapter 82. The 2003 amendments give the following definition:

“Responsible third party” means 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) as amended by HB4.

Under the 2003 amendments, a responsible third party can now include a claimant's employer who enjoys a workers' compensation bar, a person who enjoys bankruptcy protection, a person or entity beyond the jurisdictional reach of our courts, or unknown criminals, as discussed in detail below. Obviously, the elimination of the prior limitations regarding who could be a responsible third party will encourage defendants to name additional parties and further dilute their respective percentages of responsibility.

g. “John Doe” Criminally Responsible Third Parties

The 2003 amendments now allow for a procedure whereby a defendant can add as a responsible third party an unknown person who allegedly committed a criminal act. Within 60 days after the filing of a defendant's original answer, a defendant may file a motion to designate an unknown person (John Doe or Jane Doe) as a responsible third party. The court shall grant the motion to designate the unknown person if:

1. the court determines that the defendant has pled facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;
2. the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and
3. the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.

Tex. Civ. Prac. & Rem. Code §33.004(j) as amended by HB4.

h. Striking a Designation of a Responsible Third Party

The 2003 Legislature added a provision allowing a party to move to strike a designation of a responsible third party. Section 33.004(l) reads:

After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that 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.

Tex. Civ. Prac. & Rem. Code §33.004(l) as amended by HB4.

In essence, this is a no-evidence motion for summary judgment that requires the defendant to come forward with sufficient evidence to create a fact issue to support the submission of the responsible third party in the proportionate responsibility jury question. *See Bueno*, 2005 W.L. 647026 (outlining requirements of motion to strike).

4. Submission Must Be Supported By the Evidence

The 2003 amendments codified what was previously understood to be the law - submission of any person in the proportionate responsibility question requires sufficient evidence to support the submission. In *The Kroger Company v. Betancourt*, 996 S.W.2d 353 (Tex. App. - Houston [14th Dist.] 1999, rev. denied), the Fourteenth Court of Appeals held that the submission of a settling party was not mandatory. Rather, the submission must be supported by the defendant's pleadings that the settling party was at fault and there must be sufficient evidence of the fault admitted in trial. The 2003 amendments have essentially codified this holding by adding Section 33.003(b), which reads:

This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support that submission.

5. Settlements & Credits

The legislature significantly modified the way settlement credits are handled for cases filed on or after July 1, 2003. As noted below, the process for credits was changed again in 2005 for non-health care liability cases filed on or after its effective date (June 9, 2005), as well as any pending cases in which the trial or a new

trial begins on or after the effective date. See S.B. 890, section 2, 79th Texas Legislature.

a. Credit for Claimant's Percentage of Responsibility

As with the 1987 and 1995 amendments, a claimant's recovery is reduced by a percentage equal to the claimant's percentage of responsibility. Tex. Civ. Prac. & Rem. Code §33.012(a).

b. Credit for Settlements in Non-Health Care Liability Claims

Under the 2003 amendments, to figure the settlement credit, you must determine whether your claim is a Health Care Liability Claim under Chapter 74. If your claim is not a health care claim, then the method for determining the settlement credit is totally different than under the 1995 rules. Now, the settlement credit is calculated as follows:

If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to each settling person's percentage of responsibility.

Tex. Civ. Prac. & Rem. Code §33.012(b) as amended by HB4.

In non-health care liability claims, the dollar for dollar credit and sliding scale credits are totally eliminated.

c. Credit for Settlements in Health Care Liability Claims

Claimants with health care liability claims under chapter 74 also follow different

settlement credit rules under the 2003 amendments.

Notwithstanding Subsection (b), if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:

(1) the sum of the dollar amounts of all settlements; or

(2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

Tex. Civ. Prac. & Rem. Code §33.012(c) as amended by HB4.

Thus, in a health care claim the defendants have the option to elect a dollar for dollar credit or the new percentage credit described above. As with the 1995 election rules, the defendant must make the election before submission to the jury. One election is binding on all defendants. If no defendant makes an election or if there are conflicting elections, all defendants are considered to have elected the dollar for dollar reduction.

6. Joint & Several Liability

The 2003 amendments eliminated joint and several liability for toxic torts and toxic releases. Under the 1995 amendments, joint and several liability existed if (1) the defendant is 15% or more responsible for the occurrence and (2) the claimant's personal injury, property damage, death, or other harm (a) is caused by the depositing,

discharge, or releasing into the environment of any hazardous or harmful substance as described in 33.011(7) or (b) resulted from a toxic tort. The 2003 amendments eliminated this basis for joint and several liability.

Other than the above modification, the joint and several rules did not change in substance from 1995 to 2003. However, the location of those rules have now been consolidated in section 33.013 as amended by HB4.

7. Definition of Claimant Expanded

The 2003 amendments expanded the definition of “claimant.” As discussed later in the paper in the section on “Derivative Claim Problems: *Utts* and *Drilex*,” this expanded definition of claimants presents potential problems in multi-plaintiff cases based on derivative liability where there is still a dollar for dollar credit. In non-health care claims, the absence of the dollar for dollar credit eliminates the problems presented to multi-plaintiffs with derivative claims. An in depth discussion of that problem is reserved for later in the paper. But the new definition of claimant essentially codifies the *Drilex* holding and reads:

“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.

Tex. Civ. Prac. & Rem. Code §33.011(1) as amended by HB4

8. Definition of “Settling Person” Modified

A settling person was previously defined in the 1995 amendments as “. . . a person who at the time of submission has paid or promised to pay. . .” This language arguably allowed for post-submission settlements without a corresponding credit. *See Vela v. Garza*, 975 S.W.2d 801 (Tex. App. - Corpus Christi 1998, no pet.).

The 2003 amendments now define a settling person as “. . . a person who has, at any time, paid or promised to pay. . .” Tex. Civ. Prac. & Rem. Code §33.011(5) as amended by HB4. The amendments also eliminated the “at the time of submission” language.

D. 2005 Tort Reform

In 2005, the Texas Legislature made a minor modification to the proportionate responsibility statute enacted by the 2003 amendments. These changes deal with the calculation of settlement credits in non-healthcare liability claims. The following two sections of this paper discuss when these new settlement credit rules apply and explain how to make calculations under the new settlement credit rules.

1. Does the 2005 amendments to the proportionate responsibility statute apply?

The 2005 legislature made a modification to Texas Civil Practice and Remedies Code 33.012(b), which deals with the handling of settlement credits. The new rules regarding settlement credits are effective if an action is commenced on or after June 9, 2005 or the action is pending on June 9, 2005 and the trial, new trial, or re-trial begins on or after June 9, 2005. Thus, either the action commencement date or the trial date can trigger the new settlement credit rules.

2. Settlement credits in non-health care liability claims.

The 2005 amendments to Chapter 33.012(b) affect the calculation of settlement credits in non-health care liability claims. As you recall under the 1995 amendment the settlement credit was either a dollar-for-dollar credit or a sliding scale credit, depending the election of the defendants. In 2003, this system was modified such that the settlement credit equaled "a percentage equal to the settling person's percentage of responsibility." Thus, under the 2003 amendments, the settlement credit was found by multiplying the settling parties' percentages of fault against the verdict. However, this method required the defendant to actually prove that the settling party was at fault and not just rely on the benefit of a dollar-for-dollar credit.

Not surprisingly, in 2005, the legislature amended 33.012(b) to eliminate a settlement credit based on the percentage of fault assigned to the settling party. Now, in cases that apply the 2005 amendments, the settlement credit is a dollar-for-dollar credit. More specifically, the statute reads: "if the claimant has settled with one or more

persons, the Court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amount of all settlements." Tex. Civ. Prac. & Rem. Code §33.012(b) as amended by Senate bill 890 in 2005.

IV. OTHER ISSUES RELATED TO CONTRIBUTION AND INDEMNITY

A. Contribution and Indemnity under Article 21.21 of the Insurance Code

The Texas Supreme Court considered at length the question of contribution as it applies to Article 21.21 of the Texas Insurance Code in *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991). The court reached two major holdings in this case. First, the court concluded that, under the "one satisfaction rule" of *Bradshaw v. Baylor University*, 84 S.W.2d 703 (Tex. Comm. App. 1935, opinion adopted), a non-settling defendant is entitled to contribution credit from monies paid in settlement by co-defendants. Second, the court held that these contribution credits are to be applied after any trebling provided for under the insurance code.

B. Statutes of Limitations for Contribution and Indemnity

The right to receive contribution, like that to receive indemnity, remains derivative from the substantive legal liability of the tortfeasors to the plaintiffs. *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978). The statute of limitations does not begin to run against a cause of action for contribution or indemnity, however, until the contribution plaintiff is cast in judgment. *Amoco Chemicals Corp. v. Malone Service Co.*, 712

S.W.2d 611 (Tex. App. - Houston [1st Dist.] 1986, no writ).

C. The Single Injury Rule

Defendants can be joint tortfeasors only if they contributed to a "single indivisible" injury to the plaintiff. *Stewart Title*, 822 S.W.2d at 7-8. If the defendants did not cause the same injury, but were each the cause of separate, distinct injuries, the defendants cannot be joint tortfeasors. *Id.* at 8; see *First Title Co. v. Garrett*, 860 S.W.2d 74, 78-79 (Tex. 1993). For example, an asbestos defendant cannot recover any contribution credit for a prior settlement made to the plaintiff for a medical malpractice claim, because the injuries are distinct. *Owens-Corning Fiberglass Corp. v. Schmidt*, 935 S.W.2d 520, 52 (Tex. App. - Beaumont 1997, writ denied).

D. No Contribution for Exemplary Damages

A defendant cannot be jointly and severally liable for another defendant's exemplary damage. The Texas Civil Practice and Remedies Code provides specifically that an exemplary damage award must "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.

E. Waiver and Postjudgment Contribution

Generally, if a defendant fails to assert its contribution rights, they are waived. *NowSCO Services Div. of Big Three Industries, Inc. v. Lassman*, 686 S.W.2d 197, 199 (Tex. App. - Houston [14th Dist.] 1984, writ ref'd n.r.e.). The defendant has the burden to submit proper contribution issues to the jury. See *Travelers Inc. Co. v.*

United States, 283 F.Supp. 14, 31 (S.D. Tex. 1968). Texas courts have held that a defendant who fails to timely assert his contribution rights waives those rights. See *Ohio Medical Products, Inc. v. Suber*, 758 S.W.2d 870, 872 (Tex. App. - Houston [14th Dist.] 1988, writ denied) (holding that a defendant that filed cross claims raising contribution issues for the first time at trial had not timely filed the cross claims and as a result waived them).

The Texarkana Court of Appeals recently held that a defendant is 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 Texas Civil Practice and Remedies Code §33.016(b), that provides 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 claim will be waived. *Id.* at 874; see also *Union City Body Co., Inc. v. Ramirez*, 911 S.W.2d 196, 207-208 (Tex. App. - San Antonio 1995, no writ) (Duncan, J. dissenting). This harsh rule, if broadly adopted, makes it imperative that named defendants file third party petitions and join other potentially liable joint tortfeasors into the primary litigation to protect their contribution rights.

F. Double Dipping Not Allowed

In *Roberts v. Williamson*, 52 S.W.3d 343 affirmed 111 S.W.3d 113 (Tex. 2003) (Tex. App.- Texarkana 2001), the Texarkana Court of Appeals addressed some of the difficulties in correctly applying the 1995 versions of sections 33.012 and 33.013 of the Texas Civil Practice and Remedies Code. This case provides some guidance on

the appropriate application of the settlement credit statute.

In *Roberts*, the Williamsons sued a hospital and several physicians for medical malpractice after their newborn child suffered brain injuries as a result of oxygen deprivation. *Roberts*, 52 S.W.3d at 346. The Williamsons settled claims against the hospital and two of the doctors for \$468,750. *Id.* The jury assessed the total damages at \$3,010,001. *Id.* The jury found Dr. Roberts 15% responsible for the damages, and thus, not jointly and severally liable. *Id.* Based on these findings, the trial court rendered judgment against Dr. Roberts for \$451,500.15, an amount equal to fifteen percent of the total damages. *Id.* Dr. Roberts argued that according to section 33.012(b) of the Texas Civil Practice and Remedies Code, the settlement payment (\$468,750) made by the settling defendants should be deducted from her total liability (\$451,500.15) on the dollar-for-dollar basis that she elected under section 33.012(b). *Id.* at 353. This formula would leave the Williamsons with no recovery from Dr. Roberts. *Id.* Alternatively, Dr. Roberts argued that the trial court should have reduced the total amount of damages (\$3,010,001) by the settlement amount (\$468,750) which would leave \$2,541,251, and then multiply that amount by 15% (amount of responsibility attributed to Dr. Roberts by the jury) to reach a \$381,187.65 judgment against Dr. Roberts. Dr. Roberts' suggested formulas for calculating her liability are outlined below:

Roberts argument 1:

Damages = \$3,010,001

Dr. Roberts liability = 15% or \$451,500.15

Deduct hospital settlement credit of \$468,750 from Dr. Roberts = total liability.

$$(\$451,500.15 - \$468,750) = <17,249.85>$$

Judgment against Dr. Roberts = **\$0**

Dr. Roberts argued that the settlement credit should be deducted from her total liability. As the settlement credit is more than her liability, plaintiffs should receive nothing from her.

Roberts argument 2:

Damages = \$3,010,001

Deduct hospital settlement credit of \$468,750 from total damages:

$$(\$3,010,001 - \$468,750) = \$2,541,251$$

Dr. Roberts liability:

$$(0.15 \times \$2,541,251) = \$381,187.65$$

Here, Dr. Roberts advocates subtracting the settlement credit from the total damage amount prior to calculating her 15% liability.

The Texarkana Court of Appeals rejected both of Dr. Roberts' arguments regarding her amount of liability. *Id.* The court cited to *C&H Nationwide, Inc. v. Thompson* and stated that Dr. Roberts was not jointly and severally liable to the Williamsons because her liability did not exceed 50%. 903 S.W.2d 315, 321 (Tex. 1994). As such, Dr. Roberts' liability is calculated by multiplying her percentage of responsibility by the total amount of damages. *Id.* Dr. Roberts' liability cannot, however, exceed more than the total amount of damages less the settlement credit received from the hospital's settlement with the Williamsons. Below is the formula

utilized by the court to determine the judgment against Dr. Roberts:

Method utilized by trial court:

Damages = \$3,010,001

Dr. Roberts liability: $(.15 \times \$3,010,001) = \$451,500.15$

The court relied on §33.012(a) and multiplied Dr. Roberts' percentage of responsibility by the total damages. Dr. Roberts benefits from the settlement credit because it creates a cap on her liability. Because her 15% responsibility does not exceed \$2,541,251, Dr. Roberts' liability is correctly calculated by taking 15% of the total damages.

As illustrated above, Dr. Roberts' liability did not exceed the liability cap created by the hospital's settlement with the Williamsons. As such, the court of appeals held that the trial court correctly calculated Dr. Roberts' liability. *Id.* at 354. In upholding the trial court's calculation, the court of appeals stated that the purpose of the settlement credit statute is to prevent a plaintiff from obtaining a recovery in excess of the plaintiff's total damages. *Id.* at 353 (citing *C&H Nationwide, Inc.*, 903 S.W.2d at 321). The liability cap created by the settlement credit ensures that a plaintiff does not receive a recovery in excess of the total damages assessed by the jury.

On July 3, 2003, the Texas Supreme Court affirmed the Texarkana Court of Appeals' opinion in *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003). It affirmed the Texarkana Court of Appeals' opinion with regard to the settlement credit holding that a non-settling defendant who is not jointly and severally liable, is liable for no more than the percentage of liability found by the jury.

Thus, Dr. Roberts' percentage of liability was properly multiplied by the total amount of damages found by the jury, with the settlement credit amount acting only as a cap on Dr. Roberts' liability.

G. Derivative Claim Problems: *Utts* & *Drilex*

Drilex Sys. Inc. v. Flores, 1 S.W.3d 112 (Tex.1999), and *Utts v. Short*, 31 S.W.3d 822 (Tex. 2002), dramatically affect the way partial settlements are handled in multi-plaintiffs cases based on derivative claims.

The Texas Supreme Court held in *Drilex Sys. Inc. v. Flores* that all members of a family seeking recovery of damages arising out of injuries to one person are considered as a single "claimant" for settlement credit purposes. The Court then held that all settlement dollars paid to all such family members are deducted from the entirety of the recovery award to such family. Thereafter, each family member recovers the percentage of the remaining award, after the settlement reduction, in an amount equal to each family member's percentage of the total dollar awarded by the jury. In *Drilex*, the settling plaintiffs remained as plaintiffs in the lawsuit and proceeded to judgment against non-settling defendants.

In *Utts v. Short*, settlement proceeds were paid to one wrongful death beneficiary whose claims were then non-suited and who was no longer a party to the lawsuit at the time of submission to the jury. However, the settlement proceeds were shared by the other plaintiffs who ultimately secured a verdict against the non-settling Defendants. In this case, the Supreme Court held that there is a presumption that all parties benefited by the settlement with the non-suiting plaintiff and the entirety of the

settlement paid to the non-party would be the amount of the credit applicable. However, non-settling plaintiffs can rebut this presumption by showing they received no benefit from the settlement in question.

The decision in *Utts* contains a myriad of majority, concurring, and dissenting opinions. Some Justices conclude that the *Drilex* opinion should be overruled. Three Justices conclude that the *Drilex* opinion should have been applied without regard to whether the settling Plaintiff was a party to the lawsuit or not. Some Justices distinguished *Drilex* from the facts in the *Utts* case.

Under the 1995 amendments, if settling plaintiffs remain in a lawsuit involving derivative action claims, then it appears the majority of the Supreme Court will apply the *Drilex* rules and reduce the jury award by the amounts of monies paid to any and all Plaintiffs. If the settling plaintiffs are no longer parties, then there is a presumption that all remaining plaintiffs received benefits from the settlement and all should be burdened with the settlement credit. However, that presumption can be overcome by a showing that the non-settling plaintiff received no benefit from the settlement in question.

The 2003 legislative changes to the definition of "Claimant" may have the effect of codifying the *Drilex* rules for application of settlement credits in both the cases where the settling plaintiffs remain as parties and in the *Utts* situation where the settling Plaintiffs no longer remain as parties at the time of submission.

Under the 2003 amendments, a "Claimant . . . includes . . . any person who is seeking, has sought, or could seek recovery of damages . . .", Tex. Civ. Prac. &

Rem. Code §33.011(1)(B) as amended by House Bill 4. The Legislature has clearly included within the definition of claimant parties who in the past have sought, but are no longer a party at the time of submission. The Legislature also includes persons who "could seek" but presumably have not. We suspect this language was included to insure a credit is given for any presuit settlement that is reached with any of the claimants who never actually became plaintiffs in a lawsuit.

While the 2003 amendments codified *Drilex*, now that the settlement credit - in cases to which the 2003 amendments apply - is equal to the percentage of the settling person's fault, the change is irrelevant. However, the *Drilex* rules will still affect Health Care Claims where the defendants elect a dollar-for-dollar settlement credit or non-Health Care Claims to which the 2005 amendments to apply and there is a dollar-for-dollar credit.

In summary, when operating under the 1995 amendments, it appears that *Utts* and *Drilex* will provide the rules for application of settlement credits. Under the 2003 and 2005 amendments, the Courts will most likely determine that the *Drilex* method for applying settlement credit will apply in all cases where a dollar-for-dollar credit is elected. This includes cases where: settling parties remain as plaintiffs; settling parties never became plaintiffs and settling parties were once plaintiffs but non-suited their claims.

Operation of the *Drilex* rules in applying the settlement credit presents potentially significant problems to plaintiffs with derivative claims. These problems are perhaps at their worst when multiple plaintiffs hire separate lawyers to represent them in claims arising out of a single death

or injury. Under the *Drilex* rules, one group of plaintiffs could settle and burden the remaining plaintiffs with a credit when those plaintiffs received no benefit from the settlement.

Further, agreeing to a partial settlement may cause some plaintiffs to have their jury award reduced by a great deal and others reduced by a smaller amount. Plaintiff lawyers should disclose the effects of the *Drilex* rules and obtain consent to enter into partial settlements in these types of cases. The reason for this issue is that the reduction as between plaintiffs is not dependent upon the amounts those plaintiffs receive from a partial settlement, but rather is dependent upon the amount of money that the plaintiffs are awarded by the jury.

H. Circular Indemnity

A problem that can arise with indemnity is circular indemnity which can defeat a plaintiff's attempt to collect any damages. In *Martinez v. Gulf States Utility Co.*, 864 S.W.2d 802 (Tex. App. - Houston [14th Dist.] 1993, writ requested), the plaintiff settled with two of the three defendants and indemnified the two settling defendants "from any liability for any cross actions seeking contribution and indemnity." Gulf States, the remaining defendant, then moved for summary judgment on the basis that it was owed statutory indemnity by the settling defendants. Gulf States argued "that the suit against it was extinguished because anything that would be paid by them could be recovered, by statute, from [the settling defendants] which, in turn, could recover from appellants by contract." *Martinez*, 864 S.W.2d at 803. The court first rejected the plaintiff's claims that the statutory indemnity was inapplicable; they ruled that the express negligence test was met by the language quoted above. The resulting

circular indemnity defeated the plaintiff's claims against Gulf States.

I. Proof Problems Associated with the Settlement Credit

The Court's opinion in *Foust v. Estate of Walters*, 21 S.W.3d 495 (Tex. App. - San Antonio 2000, pet. denied) demonstrates an evidentiary problem with settlement and the amount of the credit. In *Foust*, the evidence showed that a codefendant forgave approximately \$14,000 in debt owed by plaintiff, and plaintiff subsequently non-suited the codefendant. Nevertheless, the court held that the litigating defendant failed to prove that the debt forgiveness was a settlement subject to credit. The court found there was no settlement agreement, the codefendant did not obtain a release for plaintiff's claims (only a non-suit without prejudice), and the debt forgiveness was at least superficially a unilateral act on the codefendant's part.

V. CONCLUSION

Indemnity and proportionate responsibility law in Texas is one of the most complex areas of personal injury practice. In any multiple party case, the Plaintiffs and Defendants must consider the implications of proportionate responsibility and indemnity from their initial pleadings, to settlement, and finally through the entry of judgment. These complex laws require a practitioner to carefully study and to analyze the application of these laws to the facts of each individual case.