

CHAPTER 33: A GUIDE TO APPLYING AND CALCULATING PROPORTIONATE RESPONSIBILITY IN TEXAS

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I. INTRODUCTION

Regardless of practice area, the Proportionate Responsibility statute, under Chapter 33 of the Civil Practice and Remedies Code, continues to affect some of the most important questions of tort law in Texas: who pays, who receives, and by how much? Texas’s defense-friendly legislation significantly changed proportionate responsibility rules in 2003 and again in 2005, limiting the recovery for tort victims and creating mechanisms for defendants to dilute their responsibility as assigned by a jury.¹ An

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1. *Compare* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33, 1995 Tex. Gen. Laws 971, 971–75, *amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847, 855–59 (showing Texas’s original defense-friendly legislation), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 33 (West 2017) (modifying proportionate responsibility allocation).

understanding of how Chapter 33 impacts case values and strategies to maximize a plaintiff's recovery is critical to providing effective representation.

This Article is intended to be a practical Texas guide to applying and calculating the provisions of Chapter 33.

II. WHEN CHAPTER 33 APPLIES

The first step to understanding proportionate responsibility in Texas is knowing when it applies to a particular case. In 1995, the Texas Legislature vastly expanded Chapter 33 (which previously applied to specific theories of liability) to "any cause of action based [in] tort."² Courts continue to adhere to the rule that proportionate responsibility generally applies to all common law and statutory tort claims unless a claim has its own separate and conflicting legislative fault-allocation scheme.³

In the absence of separate statutory provisions that might exclude a claim from proportionate responsibility under Chapter 33, the rule does not apply to workers' compensation claims or exemplary damages claims, including those against an employer.⁴ Of these, some of the most widely used exclusions by plaintiffs' attorneys include claims for exemplary damages, which are not subject to the restrictions and limitations of Chapter 33.⁵ The fact that exemplary damages cannot be offset by a claimant's comparative fault or diluted from the inclusion of responsible third parties can play an important role in creating leverage against defendants, and this should be considered from the time a case is initially valued to when arguments are made before the jury at trial.

III. DETERMINING PROPORTIONATE RESPONSIBILITY: CHARGE SUBMISSION AND PERCENTAGES

Once a claim is deemed to fall under Chapter 33, the inquiry turns to who can be submitted on a jury charge and how the comparative fault might

2. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971 (amended 2003); *see JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 704 (Tex. 2008) (discussing the application of Chapter 33 following the 1995 amendments).

3. *JCW Elecs., Inc.*, 257 S.W.3d at 704–07; *see, e.g., Sw. Bank v. Info. Support Concepts, Inc.*, 149 S.W.3d 104, 110–11 (Tex. 2004) (holding that Chapter 33 does not apply to UCC-based or conversion claims due to conflict with the UCC's comparative negligence scheme); *see also, e.g., Challenger Gaming Sols., Inc. v. Earp*, 402 S.W.3d 290, 296–97 (Tex. App.—Dallas 2013, no pet.) (holding that Chapter 33 does not apply to a Uniform Fraudulent Transfer Act (UFTA) claim because of conflicts between its plain meaning and, additionally, that Chapter 33 and the UFTA statute cannot be reconciled).

4. *See* CIV. PRAC. & REM. § 33.002(c)(1)–(3) (excluding actions to collect workers' compensation benefits or actions against an employer for "exemplary damages arising out of the death of an employee"; "claim[s] for exemplary damages included in an action" that is otherwise subject to this chapter; and "cause[s] of action for damages arising from the manufacture of methamphetamine").

5. *Id.* § 33.002(c)(2).

affect the ultimate recovery at trial.⁶ Currently, upon the showing of sufficient evidence, the following persons are included on civil jury charges:

- “(1) each claimant;
- (2) each defendant;
- (3) each settling person; and
- (4) each responsible third party who has been designated under Section 33.004.”⁷

Prior to the 1995 amendments, plaintiffs’ attorneys had control over who appeared on the jury charge, which at the time was limited to plaintiffs, settling parties, and defendants.⁸ In 1995, however, the legislature permitted defendants to begin adding “each responsible third party who ha[d] been joined under Section 33.004.”⁹ For the first time, the adoption of this subparagraph made it possible for defendants to include additional parties in the jury charge and thereby potentially dilute their share of responsibility.¹⁰ While the creation of responsible third parties in 1995 was unprecedented, it came with a statute of limitations.¹¹ For example, a defendant had to join a responsible third party to the suit and had to do so within the party’s limitations period or before thirty days following its deadline to file an answer.¹² By eliminating many of these limitations, and making several other changes to Chapter 33 in 2003, the amendments rendered Chapter 33 defense-friendly.¹³

A. Responsible Third Parties

Following the passage of House Bill 4 (H.B. 4) in 2003, defendants no longer had to join responsible third parties to a case.¹⁴ Instead, § 33.004(a)(4) replaced the word “join” for “designate.”¹⁵ Further, the designation of third

6. *Infra* Section III.B (discussing how comparative fault effects the ultimate recovery at trial).

7. CIV. PRAC. & REM. § 33.003(a).

8. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, 1987 Tex. Gen. Laws 37, 41, *amended by* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.003, 1995 Tex. Gen. Laws 971, 972.

9. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.003(4), 1995 Tex. Gen. Laws 971, 972 (amended 2003).

10. Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 2.06, sec. 33.003(4), 1987 Tex. Gen. Laws 37, 41 (amended 1995) (limiting jury charges to plaintiffs, settling parties, and defendants), *with* Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.003, 1995 Tex. Gen. Laws 971, 972 (amended 2003) (allowing defendants more control over jury charges).

11. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.003, 1995 Tex. Gen. Laws 971, 972 (amended 2003).

12. *Id.*

13. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02, 2003 Tex. Gen. Laws 847, 855 (codified at TEX. CIV. PRAC. & REM. CODE § 33.003).

14. *See* MCI Sales & Serv., Inc. v. Hinton, 272 S.W.3d 17, 35 (Tex. App.—Waco 2008), *aff’d*, 329 S.W.3d 475 (Tex. 2010) (discussing how actions filed before July 1, 2003, required responsible third parties to be joined in the lawsuit, not simply named or designated parties).

15. CIV. PRAC. & REM. § 33.004(a); Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004(a), 1995 Tex. Gen. Laws 971, 972 (amended 2003).

parties on a jury charge, or a finding of their responsibility by a jury, did not, in and of itself, impose liability.¹⁶ This remains the rule today and can be especially problematic with cases involving potentially immune, yet responsible, third parties, such as governmental units, unknown parties, or insolvent parties that may otherwise have no liability in the case.¹⁷

Perhaps one of the more significant changes to the 2003 amendments was the elimination of the strict requirement that third parties be joined in the suit prior to their limitations period.¹⁸ Under the modified statute, the legislature only bars defendants from post-limitations designations “if the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party under the Texas Rules of Civil Procedure.”¹⁹ Since this change, courts have only permitted post-limitation designations in two circumstances: (1) where a codefendant is designated after being nonsuited following limitations,²⁰ and (2) where a lawsuit is filed on the eve of statute, thus making timely designation impossible.²¹

While designating responsible third parties after the limitations period has been made possible since the 2003 amendments, courts remain reluctant to extend § 33.004(d) beyond its current application due to the obvious disadvantages the rule poses to plaintiffs.²² As explained by the United States District Court for the Eastern District of Texas: “Working as a procedural safeguard, the ‘timely disclosure’ requirement seeks to guarantee that the defendant essentially cannot undercut the plaintiff’s case by belatedly pointing its finger at a time-barred responsible third-party against whom the plaintiff has no possibility of recovery.”²³

It is important to note that the few instances where courts have allowed post-limitations designations *do not* apply where such a ruling conflicts with

16. CIV. PRAC. & REM. § 33.004(i)(1).

17. See, e.g., *City of El Paso v. Collins*, 440 S.W.3d 879, 882 (Tex. App.—El Paso 2013, no pet.).

18. Compare Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.004, 1995 Tex. Gen. Laws 971, 972 (amended 2003) (banning third parties from being joined after the limitations period expires), with Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.04, 2003 Tex. Gen. Laws 847, 855–56, amended by Act of May 25, 2011, 82d Leg., R.S., ch. 203, § 5.01, 2011 Tex. Gen. Laws 757, 759 (allowing third parties to be joined after the limitations period expires).

19. CIV. PRAC. & REM. § 33.004(d) (2003); see also *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018) (per curiam) (holding that responsible third party designations are not permitted where defendant failed to disclose “[t]he name, address, and telephone number of any person who may be designated as a responsible third party” in accordance with Texas Rule of Civil Procedure 194.2(l)).

20. See, e.g., *In re CVR Energy, Inc.*, 500 S.W.3d 67, 74 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (upholding a post-limitations designation where the plaintiff nonsuited former codefendant from a suit following limitations period).

21. See, e.g., *In re Bustamante*, 510 S.W.3d 732, 737 (Tex. App.—San Antonio 2016, no pet.) (upholding a post-limitations designation where the plaintiff filed suit on eve of statute, thus making a timely designation by defendant impossible).

22. See generally *Withers v. Schneider Nat’l Carriers, Inc.*, 13 F. Supp. 3d 686 (E.D. Tex. 2014) (explaining reservations in extending application of § 33.004(d) further due to the resulting disadvantages to plaintiffs’ recovery).

23. *Id.* at 689; *In re Bustamante*, 510 S.W.3d at 736; *In re CVR Energy, Inc.*, 500 S.W.3d at 73.

another overriding statute, such as health care liability claims brought under Chapter 74 of the Texas Civil Practice and Remedies Code. In *Molinet v. Kimbrell*, the Supreme Court of Texas held that § 74.251(a) imposed an “absolute” two-year limitations period because the statute stated the limitations period was “[n]otwithstanding any other law.”²⁴

Even when defendants designate responsible third parties prior to the limitations period, § 33.004(a) also requires the motion to be filed on or before the sixtieth day before trial, “unless the court finds good cause to allow the motion to be filed at a later date.”²⁵ As before, courts will find good cause where a defendant seeks to designate a party that was previously nonsuited within sixty days of trial.²⁶

If a motion to designate a responsible third party is timely filed, the grounds to deny such a motion are limited to cases where the plaintiff can show

- (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Texas Rules of Civil Procedure; and
- (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.²⁷

In 2003, H.B. 4 also expanded the meaning of responsible third parties to include persons who cannot be identified or located for trial and whose criminal acts “w[ere] a cause of the loss or injury that is the subject of the lawsuit.”²⁸ Similar to known parties, Chapter 33’s amendments mandate that courts

shall grant a motion for leave to designate the unknown person as a responsible third party if:

- (1) the court determines that the defendant has pleaded 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

24. *Molinet v. Kimbrell*, 356 S.W.3d 407, 415 (Tex. 2011); *see also* CIV. PRAC. & REM. § 74.251(a) (“Notwithstanding any other law . . . no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort . . .”), *declared unconstitutional in part by Adams v. Gottwald*, 179 S.W.3d 101, 103 (Tex. App.—San Antonio, 2005, pet. denied).

25. CIV. PRAC. & REM. § 33.004(a).

26. *In re CVR Energy, Inc.*, 500 S.W.3d at 74 (upholding a post-limitations designation where the plaintiff nonsuited former codefendant from suit following limitations period).

27. CIV. PRAC. & REM. § 33.004(g).

28. *Id.* § 33.004(j).

- (3) the allegation satisfies the pleading requirements of the Texas Rules of Civil Procedure.²⁹

While there are a few changes noted in the statute, the criteria to designate unknown responsible third parties remain closely tied to Texas's notice pleading requirements.

Recently, defendants have also used responsible third party designations to bypass otherwise strict statutory requirements for health care liability claims filed under Chapter 74. Typically, claims filed under Chapter 74 must be supported by expert reports, and those involving alleged deficient emergency medical care require claimants to establish the health care provider deviated from the standard of care “with willful and wanton negligence.”³⁰

In *ExxonMobil Corp. v. Pagayon*, the defendant designated an emergency medical care provider as a responsible third party to the plaintiff's lawsuit, which alleged injuries and ultimately death suffered after being shot at a gas station.³¹ Before trial, the plaintiff moved to strike ExxonMobil's designation on the sole ground that there was no evidence that the emergency room doctor deviated from the standard of care with wilful and wanton negligence, as required under § 74.153.³² Here, the appellate court disagreed that § 74.153 imposed a higher standard of care, and instead required a higher standard of *proof* in order for a plaintiff to prevail on claims against emergency medical care providers.³³ Specifically, “Chapter 74 does not change the ‘acceptable standard of medical care’; it simply allows one providing emergency medical care to deviate from that standard by a wider margin before becoming liable in damages for its breach.”³⁴ While the court recognized that Chapter 74 requires a higher standard of proof to make a provider *liable*, it held Chapter 33 does not require the same standards of proof to make a third party *responsible*.³⁵ Accordingly, in this context, there is no “goose-gander” equivalency.³⁶ In cases involving emergency medical care, plaintiffs have the higher statutory burden of proving that the provider acted with wilful and wanton negligence, whereas defendants can designate

29. *Id.*

30. *Id.* §§ 74.151, .153.

31. *ExxonMobil Corp. v. Pagayon*, 467 S.W.3d 36, 48 (Tex. App.—Houston [14th Dist.] 2015), *rev'd on other grounds*, 536 S.W.3d 499 (Tex. 2017).

32. *Id.* at 49.

33. *Id.* at 50.

34. *Id.*

35. *Id.* (“In contrast to section 74.153, the proportionate-responsibility statute does not address the standard of proof for a claimant to hold a defendant liable for damages. It instead provides a means for comparing the extent of fault, providing the means for a defendant to reduce both its own liability and the claimant's recovery.”).

36. *What's Good for the Goose Is Good for the Gander*, MACMILLAN DICTIONARY, <http://www.macmillandictionary.com/us/dictionary/american/what-s-good-for-the-goose-is-good-for-the-gander> (last visited Apr. 18, 2019).

responsible third parties by merely presenting evidence sufficient to raise a fact question about whether the party's ordinary negligence caused or contributed to the plaintiff's damages.³⁷

Regardless of the challenges Chapter 33 poses to plaintiffs seeking to prevent responsible third parties from appearing on a jury charge, timely objecting to a defendant's motion to designate responsible third parties may still be useful and is essential to preserve the issue for error on any potential appeal.³⁸ Even when objections are overruled, it provides an opportunity to begin familiarizing the trial judge with the facts and issues in a given case. This is especially true if the facts and issues may become the basis to strike the party's designation after an adequate time for discovery. Either way, there is no substantive downside to timely objecting to a defendant's motion to designate responsible third parties.

Once a defendant's motion to designate is granted, the only method to strike a responsible third party is to show, after an adequate time for discovery, that there is "no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage."³⁹ Essentially, this operates as a no-evidence motion for summary judgment filed against the defendant's designation.⁴⁰ Similarly, if a responsible third party becomes a defendant, they may still be dismissed from the case and jury charge if a trial court grants their no-evidence motion for summary judgment under Rule 166a(i).⁴¹

It is important to consider potential responsible third parties in a case as early as possible, and ideally before any fact or liability depositions occur.⁴² Early identification of responsible third parties may impact litigation strategy and allows attorneys to direct discovery and questioning of witnesses in a manner that focuses liability on target defendants, while building a record that supports no-evidence motions to strike non-target third parties that may be designated throughout litigation.⁴³

37. *Pagayon*, 467 S.W.3d at 51.

38. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(g) (West 2017); *see also* *Flack v. Hanke*, 334 S.W.3d 251, 259 (Tex. App.—San Antonio 2010, pet. denied) (holding that, absent a timely objection, plaintiffs waived any objection to defendant's motion for leave to designate responsible third parties).

39. CIV. PRAC. & REM. § 33.004(l); *see also In re Brokers Logistics, Ltd.*, 320 S.W.3d 402, 407 (Tex. App.—El Paso 2010, pet. denied) ("[T]he plain language of Section 33.004(l) reflects that the Legislature did not intend for a responsible third party designation to be struck on any ground other than the one contained in the statute.").

40. *See Flack*, 334 S.W.3d at 262 ("The similarity in language between section 33.004(l) and a no-evidence summary judgment is not coincidental.").

41. *See* TEX. R. CIV. P. 166a(i).

42. *See* Elaine A. Carlson, *Tort Reform: Redefining the Role of the Court and the Jury*, 47 S. TEX. L. REV. 245, 261 (2005).

43. *See* Jas Brar, *Friend or Foe?: Responsible Third Parties and Leading Questions*, 60 BAYLOR L. REV. 261, 275 (2008).

Plaintiffs' attorneys may also benefit from naming responsible third parties as codefendants, even if they are not the target of litigation.⁴⁴ As defendants, responsible third parties may become liable to a finding of fault by a jury, whereas a designation, in and of itself, does not impose liability against a responsible third party.⁴⁵ Moreover, defense counsel for previously designated responsible third parties may find their interests mutually aligned with plaintiffs' attorneys seeking the removal of non-target defendants from the case and jury charge altogether.⁴⁶ In such circumstances, plaintiffs' attorneys may find unlikely alliances with non-target codefendants that can provide strategic advantages to discovery as both parties seek to establish a record that imposes liability against target defendants and that supports removal of the non-target parties through no-evidence motions for summary judgment.⁴⁷ A no-evidence motion for summary judgment granted against any defendant will remove them from the case and prevent codefendants from submitting their names on the jury charge.⁴⁸

B. Claimants

The 2003 amendments expanded the definition of "claimant," which has created lasting impact on the use and interpretation of Chapter 33.⁴⁹ The changes to the definition enhanced plaintiffs' comparative fault and had particular impact to multi-plaintiff litigation brought under derivative liability claims.⁵⁰ Under the current definition,

"[c]laimant" 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

44. See Carlson, *supra* note 42, at 263.

45. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(i) (West 2017).

46. See Carlson, *supra* note 42, at 261.

47. See *id.* at 265.

48. See CIV. PRAC. & REM. § 33.003(b) (requiring a person's conduct to be supported by sufficient evidence before it can be submitted to the jury).

49. See *id.* § 33.011(1).

50. *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701, 707 (Tex. 2008) (applying the post-tort reform definition of claimant to preclude a plaintiff's recovery based on increased proportionate responsibility); *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 122 (Tex. 1999), *abrogated by* *Utts v. Short*, 81 S.W.3d 822, 827 (Tex. 2002) (holding that the total of all damages recovered by a claimant and derivative claimants should be reduced by the total of all settlements received by a claimant and derivative claimants, regardless of whether settlements were paid to one or all claimants).

(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.⁵¹

Texas has a 51% bar rule, wherein “a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.”⁵² Derivative claimants are also limited and potentially barred from any recovery based on comparative fault attributed to the person whose injury or death makes the basis of the suit.⁵³

The scope of evidence used to establish a claimant’s comparative fault to limit overall recovery also changed.⁵⁴ Through the expanded language of Chapter 33, defendants can now not only use evidence that a claimant’s negligence contributed to the underlying occurrence but also to their injuries claimed therein.⁵⁵ A classic example of a plaintiff’s injury-causing negligence is evidence showing their injuries were exacerbated by failure to use a seatbelt in a car crash.⁵⁶ While failure to use a seatbelt does not contribute to the underlying incident, it may aggravate the loss and can now be used to limit a claimant’s overall recovery.⁵⁷

Prior to 2003, the Court drew a “sharp distinction” between a plaintiff’s occurrence-causing and injury-causing negligence, and only permitted evidence of occurrence-causing negligence to be admitted for the purpose of attributing comparative fault.⁵⁸ In *Kerby v. Abilene Christian College*, the Court reasoned that “[c]ontributory negligence must have the causal connection *with the accident* that but for the conduct the accident would not have happened.”⁵⁹

Following Texas’s change from a contributory to modified comparative fault scheme in 1987 and the passage of the 2003 amendments under H.B. 4, the Court recently held that the “sharp distinction” between the two categories of evidence could not be maintained.⁶⁰ In *Nabors Well Services, Ltd. v. Romero*, the Court looked at amended provisions of § 33.011(4) that directed juries “to assign responsibility to plaintiffs who cause or contribute

51. CIV. PRAC. & REM. § 33.011(1).

52. *Id.* § 33.001; *see also* *Arceneaux v. Pinnacle Entm’t, Inc.*, 523 S.W.3d 746, 748 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (holding that the § 33.001 bar-recovery rule is unambiguous and does not provide any exception where a claimant’s responsibility was found to be greater than 50%).

53. *Smith v. East*, 411 S.W.3d 519, 525 (Tex. App.—Austin 2013, pet. denied).

54. *See, e.g., Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 563 (Tex. 2015) (holding that a plaintiff’s injury-causing conduct limits discovery, opening the door to a new category of evidence).

55. *Id.* at 563–64 (discussing how failure to wear a seatbelt can contribute to an injury).

56. *See id.*

57. *See id.* at 566–67.

58. *See Kerby v. Abilene Christian Coll.*, 503 S.W.2d 526, 528 (Tex. 1973), *overruled by Nabors Well Servs., Ltd.*, 456 S.W.3d 553.

59. *Id.* (emphasis added).

60. *Nabors Well Servs., Ltd.*, 456 S.W.3d at 562.

to cause ‘in any way’ personal injury or death.”⁶¹ The Court also reviewed § 33.003(a), which similarly held claimants “accountable for ‘causing or contributing to cause in any way the harm for which recovery of damages is sought.’”⁶² In light of the 2003 amendments, the Court concluded it could no longer “maintain a ‘sharp distinction’ between two categories of evidence when the Legislature has instructed fact-finders to consider conduct that was ‘in any way’ a cause of the plaintiff’s damages.”⁶³

As a consequence, plaintiffs’ attorneys must be careful to consider both evidence that may establish their client’s negligence in contributing to the underlying incident, as well as the injuries they suffered.⁶⁴ It is also worth noting that evidence of a plaintiff’s post-occurrence failure to mitigate damages remains different from pre-occurrence injury-causing negligence.⁶⁵ A plaintiff’s failure to mitigate their damages following the subject occurrence still operates as a reduction of their damages award but is not considered for apportioning responsibility on the jury charge.⁶⁶ Having a good understanding of potential issues that could result in such evidence is instructive in mapping out discovery strategy and establishing evidence that can offset a claimant’s comparative fault under Chapter 33.

C. Defendants and Settling Persons

The final categories of persons to be included on the jury charge include defendants and settling persons.⁶⁷ As with claimants and responsible third parties, legally sufficient evidence of a settling party’s negligence is still required for her submission on an apportioned responsibility charge.⁶⁸ If no evidence exists, then settling parties should be excluded from the charge and may not be used as a basis for reduction of recovery in cases subject to percentage-of-responsibility settlement credit (as will be further discussed in the second Part of this Article).⁶⁹ This is true for cases in which the only testimony regarding a settling party’s negligence is conclusory.⁷⁰ In *Chesser*

61. *Id.* (quoting Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05(6), 2003 Tex. Gen. Laws 847, 857).

62. *Id.* (quoting Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.02, 2003 Tex. Gen. Laws 847, 855).

63. *Id.*

64. *See id.*

65. *Id.* at 564 (citing *Kerby v. Abilene Christian Coll.*, 503 S.W.2d 526, 528 (Tex. 1973)) (“[T]he conceptual difficulty of applying the mitigation of damages concept to Plaintiff’s conduct antedating the negligence of the Defendant.”).

66. *Id.*

67. TEX. CIV. PRAC. & REM. § 33.003(a) (West 2017).

68. *Id.* § 33.003(b).

69. *Chesser v. LifeCare Mgmt. Servs., L.L.C.*, 356 S.W.3d 613, 624 (Tex. App.—Fort Worth 2011, pet. denied) (citing CIV. PRAC. & REM. §§ 33.003(b), .012(e)(2)) (“[B]ecause, based on the evidence, no percentage of responsibility should have been allocated to the settling defendants, [defendant] cannot be entitled to a percentage-of-responsibility settlement credit.”).

70. *Id.* at 623.

v. LifeCare Management Services, the court rejected the argument that the defendant had presented sufficient evidence of a settling party's negligence where the evidence was limited to conclusory expert testimony.⁷¹ The court relied upon common law evidentiary principles to determine that the defendant had not met the threshold under § 33.003(b), which requires legally sufficient evidence to support a party's submission on a jury charge.⁷² While the evidentiary threshold is relatively low under § 33.003(b), it is important to keep this requirement in mind where defendants may fail to prove up a settling party's negligence throughout discovery.⁷³

Courts have also aggregated derivative claims against settling defendants, such as employers and employees, for the purposes of apportionment and settlement credit under Chapter 33.⁷⁴ In *Janga v. Colombrito*, the Dallas Court of Appeals was asked whether nurses, whose medical malpractice claims had been previously settled and paid by their hospital employer, could be considered settling parties under § 33.003(a) when the nurses did not pay either the plaintiff or the hospital in return for their release from the case.⁷⁵ Here, the court concluded that because the indirect claims of the employer were entirely derivative of the employees' direct claims of negligence, all claims should therefore be treated as one single claim.⁷⁶ Accordingly, the nurses were considered settling persons and satisfied the first requirement for submission under § 33.003.⁷⁷

Finally, changes to the definition of "settling person" in the 2003 amendments have arguably allowed defendants to benefit from credits for settlements that take place *after* the submission of the jury charge.⁷⁸ Before 2003, a settling person under the 1995 amendments was defined as "a person *who at the time of submission* has paid or promised to pay."⁷⁹ Under the changes from 2003, a settling person is now defined as "a person who has, *at any time*, paid or promised to pay."⁸⁰ While no court has been asked yet to assess a credit for settlement that took place after submission, it appears this

71. *Id.*

72. *Id.*; *see, e.g.*, *City of San Antonio v. Pollock*, 284 S.W.3d 809, 820 (Tex. 2009); *McIntyre v. Ramirez*, 109 S.W.3d 741, 749 (Tex. 2003) ("A conclusory statement of an expert witness is insufficient to create a question of fact . . ."); *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711–12 (Tex. 1997).

73. *See* CIV. PRAC. & REM. § 33.003(b).

74. *Janga v. Colombrito*, 358 S.W.3d 403, 411–12 (Tex. App.—Dallas 2011, no pet.).

75. *Id.* at 409.

76. *Id.* at 411–12.

77. *Id.* at 412.

78. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05(5), 2003 Tex. Gen. Laws 847, 857 (codified at CIV. PRAC. & REM. § 33.011(5)).

79. Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.011(5), 1995 Tex. Gen. Laws 971, 973 (amended 2003).

80. CIV. PRAC. & REM. § 33.011(5) (emphasis added). *Compare* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.05(5), 2003 Tex. Gen. Laws 847, 857), with Act of May 8, 1995, 74th Leg., R.S., ch. 136, § 1, sec. 33.011(5), 1995 Tex. Gen. Laws 971, 973 (amended 2003).

was the legislature's intent according to the plain meaning of the words that were removed and added under the 2003 amendments.

IV. CONTRIBUTION: CALCULATING TOTAL RECOVERABLE DAMAGES AND DETERMINING WHO PAYS WHAT

With an understanding of whom is submitted on a jury charge and how their comparative fault is apportioned, the remainder of Chapter 33, and this Article, discusses how to calculate recoverable damages and assign liability amongst defendants. Several key changes were made by the 2003 amendments, and again in the 2005 amendments, that impact the calculation of total damages and liability.⁸¹ Moreover, the calculation of judgments becomes even more complicated when applying proportionate responsibility for multiple defendants in a lawsuit that is also subject to a limitation of damages, such as health care liability claims under the Texas Civil Practice and Remedies Code.⁸²

A. Calculating Total Recoverable Damages

The first step to calculating total damages under Chapter 33 is to adjust the amount of damages awarded to the claimant by the proportionate responsibilities assigned by the jury to each party.⁸³ From the plain language of § 33.012(a): "If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility."⁸⁴ After the reduction for the assigned percentages of responsibility, Chapter 33 requires that a claimant's damages recovery be further reduced by any amounts received from settling parties, typically referred to as a settlement credit.⁸⁵ In 2005, the legislature eliminated the application of alternative settlement credit methodologies in non-health care liability claims, leaving only a dollar-for-dollar reduction methodology as illustrated below.⁸⁶ Section 33.012(b) now states: "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 amounts of all settlements."⁸⁷ The

81. See Act of May 27, 2005, 79th Leg., R.S., ch. 277, § 1, 2005 Tex. Gen. Laws 770, 770; Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.06–.07, 2003 Tex. Gen. Laws 847, 857–58 (amended 2005).

82. See CIV. PRAC. & REM. § 33.015–.017.

83. See *id.* § 33.012(a).

84. *Id.* § 33.012(a).

85. See *id.* § 33.012(b).

86. Compare Act of May 27, 2005, 79th Leg., R.S., ch. 277, § 1, 2005 Tex. Gen. Laws 770, 770, with Compare Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.06, 2003 Tex. Gen. Laws 847, 857–58 (amended 2005).

87. CIV. PRAC. & REM. § 33.012(b).

order of reductions and emphasis made in the first two steps is important as the plain meaning in the statute reduces plaintiff's proportionate responsibility from total damages rather than an amount already reduced by settlement credits.⁸⁸ The following example illustrates the application of proportionate responsibility and settlement credits in a non-health care liability claim to determine the total amount of a claimant's recoverable damages. In this illustration, the claimant's damages award is \$50,000, and the settling party has settled for \$25,000.

<p><u>Jury Award:</u> \$50,000 Total Damages</p> <p><u>Jury Finding:</u> Claimant - 20% responsible Non-settling Defendant - 35% responsible Settling Party (\$25,000) - 45% responsible</p> <p><u>Recoverable Damages:</u> \$50,000 - Total Damages (\$10,000) - Claimant's Negligence <u>(\$25,000) - Dollar-for-Dollar Settlement Credit</u></p> <p><u>\$15,000 to be paid by non-settling defendant</u></p>

Figure 1: Recoverable damages illustration for non-health care liability claim post-2005 amendments

While the 2005 amendments eliminated alternative credit methodologies for most cases, the 2003 amendments reserved the right for defendants to elect their preferred settlement credit methodology in health care liability claims.⁸⁹ In health care liability claims, defendants have two options to calculate the reduction amount: (1) the sum of the dollar amounts of all settlements, i.e., a dollar-for-dollar reduction; or (2) a percentage equal to each settling person's "percentage of responsibility" as found by the trier of fact, referred to as a percentage-reduction credit.⁹⁰ An election under this subsection must be made in writing by any non-settling defendant before the case is submitted to the jury.⁹¹ "If no defendant makes [an] election or if conflicting elections are made, [then] all defendants are considered to have elected [the dollar-for-dollar reduction method]."⁹² The different credit

88. *See id.*

89. *Compare* Act of May 27, 2005, 79th Leg., R.S., ch. 277, § 1, 2005 Tex. Gen. Laws 770, 770, with *Compare* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 4.06, 2003 Tex. Gen. Laws 847, 857–58 (amended 2005).

90. CIV. PRAC. & REM. § 33.012(c) (2017).

91. *Id.* § 33.012(d).

92. *Id.*

elections can impact a claimant's final recoverable damages depending on whether the jury apportions relatively more or less responsibility to a settling party as compared to their settlement amount.⁹³ These differences are illustrated in the following example using the same assumptions from Figure 1.

<u>Jury Award:</u>	
\$50,000 Total Damages	
<u>Jury Finding:</u>	
Claimant - 20% responsible	
Non-settling Defendant - 35% responsible	
Settling Party (\$25,000) - 45% responsible	
<u>Dollar-for-Dollar Credit Analysis: Percentage Reduction Credit</u>	
	<u>Analysis:</u>
\$50,000 - Total Damages	\$50,000 - Total Damages
(\$10,000) - Claimants Negligence	(\$10,000) - Claimants Negligence
<u>(\$25,000) - Dollar-for-Dollar Credit</u>	<u>(\$22,500) - Percentage Reduction Credit</u>
<u>\$15,000 to be paid by non-settling defendant</u>	<u>\$17,500 to be paid by non-settling defendant</u>

Figure 2: Recoverable damages comparison for health care liability claims credit election

B. Burden of Proof for Settlement Credits

A defendant seeking a settlement credit has the burden of proving their entitlement to the credit and settlement credit amount.⁹⁴ The proof can be satisfied simply by entering the settlement agreement or some evidence of the settlement amount into the record.⁹⁵ From there, the burden shifts to the claimant to show that any settlement amounts should be disallowed because of the settlement agreement's allocation.⁹⁶ For example, settlement credits cannot be applied to punitive damages or benefits paid by or on behalf of any employer to an employee pursuant to workers' compensation insurance coverage.⁹⁷

The rationale behind this burden shifting, the Supreme Court of Texas has explained, is that settling plaintiffs are in a better position to ensure that

93. See *infra* Figure 2.

94. See *Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002).

95. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998).

96. *Id.* at 928.

97. CIV. PRAC. & REM. §§ 33.002(c)(2), .012(e); see *Ellender*, 968 S.W.2d at 927 (holding that punitive damages cannot be applied as settlement credit).

settlement recoveries are properly allocated, for example, between actual and punitive damages, than non-settling defendants.⁹⁸ If a settling party fails to provide proof of the allocation, the non-settling defendants are entitled to a full settlement credit.⁹⁹

A non-settling defendant should present any evidence and obtain a ruling proving any entitlement to a settlement credit to the trial court outside the jury's presence and before the trial court submits the case to the jury.¹⁰⁰ The resolution of the dispute may be vital to which election the non-settling defendant chooses.¹⁰¹ However, the non-settling defendant may provide evidence post-verdict, so long as the non-settling defendant properly filed its written election under Chapter 33 before the case was submitted to the jury.¹⁰²

This is also an important step to keep in mind for plaintiffs settling with parties for exemplary damages. If plaintiffs want to exclude non-settling defendants from benefitting from a credit on this type of settlement, plaintiffs should require the release documents to stipulate what portions of the settlement constitute exemplary versus actual damages.

C. *The Interplay Between Caps and Credits*

While it is well established that the proper order for calculating recoverable damages is to first reduce by the claimant's proportionate responsibility and then apply settlement credits,¹⁰³ there is limited guidance regarding when statutory damage caps are applied in the context of other reductions.

At the time of writing this Article, the sole appellate decision addressing this topic, *Christus Health Gulf Coast v. Houston*, held that any settlement credits are applied to the damage award before applying the damage caps.¹⁰⁴ In *Christus*, a claimant brought suit against a hospital and a physician following complications that arose during an orthopedic surgery procedure.¹⁰⁵ The physician settled with the claimant for \$99,000; the suit proceeded against the hospital.¹⁰⁶ The jury awarded \$1,610,000 in total damages—\$930,000 in economic damages and \$680,000 in noneconomic damages—and allocated 60% responsibility against the hospital and 40% against the physician.¹⁰⁷ After applying settlement credits and the statutory

98. *See Ellender*, 968 S.W.2d at 928.

99. *See id.*

100. *See Utts v. Short*, 81 S.W.3d 822, 829 (Tex. 2002).

101. *See id.*

102. *Id.*

103. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (West 2017).

104. *Christus Health Gulf Coast v. Houston*, No. 01-14-00399-CV, 2015 WL 9304373, at *9 (Tex. App.—Houston [1st Dist.] Dec. 22, 2015, no pet.).

105. *Id.* at *1.

106. *Id.* at *6, *8.

107. *Id.* at *4.

cap on noneconomic damages, the award was ultimately reduced to \$1,122,813.66.¹⁰⁸

The non-settling defendant hospital appealed the final judgment, arguing that the court erred by applying the settling party's settlement credit before applying the statutory cap on noneconomic damages.¹⁰⁹ In its opinion, the court set forth two holdings.¹¹⁰ First, the court, relying on a similar decision based on governmental liability under the Texas Tort Claims Act, held that settlement offsets are to be applied before the noneconomic cap applies.¹¹¹ Second, the court held that the settlement credit should be applied proportionately to both the noneconomic- and economic-damages award.¹¹² The hospital defendant argued that, because the settlement amount was not limited to payment for noneconomic damages, the court had no basis for applying the full settlement credit to the noneconomic damages only.¹¹³ The court agreed, deciding that the settlement credit should be applied proportionately to both the noneconomic- and economic-damages award.¹¹⁴

Below is a visual representation of the decision in *Christus*:

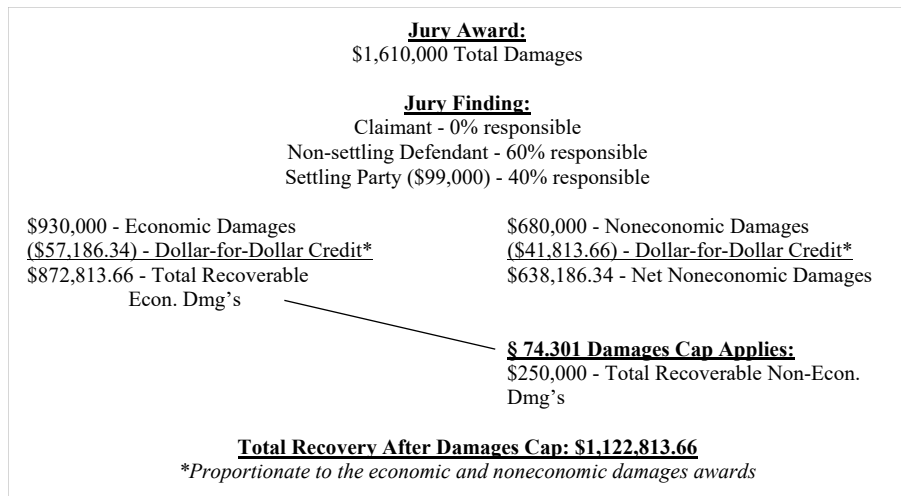


Figure 3: Recoverable damages illustration from the decision in *Christus*

Using the court's analysis from *Christus*, the following illustration is another example of a recoverable damages calculation for a health care liability claim. Consider the following example: A jury returns a verdict for

108. *Id.* at *8.

109. *Id.* at *6.

110. *Id.* at *7-8.

111. *Id.* (citing *Edinburg Hosp. Auth. v. Treviño*, 941 S.W.2d 76, 81 (Tex. 1997)).

112. *Id.* at *8.

113. *Id.*

114. *Id.* at *10.

the claimant for \$4,000,000, the settling party has settled for \$250,000, and the jury has allocated responsibility as follows:

Jury Award:	
\$4,000,000 Total Damages	
Jury Finding:	
Claimant - 20% responsible	
Non-settling Defendant - 40% responsible	
Settling Party (\$250,000) - 40% responsible	
\$3,000,000 - Economic Damages	\$1,000,000 - Noneconomic Damages
(\$600,000) - Claimant's Negligence	(\$200,000) - Claimant's Negligence
<u>(\$187,500) - Dollar-for-Dollar Credit*</u>	<u>(\$62,500) - Dollar-for-Dollar Credit*</u>
\$2,212,500 - Total Recoverable Econ. Dmg's	\$737,500 - Net Noneconomic Dmg's
	<u>§ 74.301 Damages Cap Applies:</u>
	\$250,000 - Total Recoverable Non-Econ. Dmg's
<u>Total Recovery After Damages Cap: \$2,462,500</u>	
<i>*Proportionate to the economic and noneconomic damages awards</i>	

Figure 4: Damages calculation of a Ch. 74 health care liability claim

D. Other Considerations – Utts Settlement Credit Defeating Transactions

One situation that may arise occurs when multiple claimants attempt to utilize creative settlement agreements as settlement-credit defeating schemes. This may occur, for example, when a codefendant to litigation settles with only one of multiple plaintiffs to be removed from the cause, enabling the other remaining coplaintiffs to proceed against the non-settling defendant without limits from settlement credits paid by the settling defendant. In *Utts v. Short*, the Supreme Court of Texas addressed such a scenario.¹¹⁵

In *Utts*, the surviving spouse, children, and estate of a patient who died following a surgical procedure brought a wrongful death action against a hospital and a physician.¹¹⁶ One of the patient's children, his daughter, settled with the hospital for \$200,000, distributing proceeds to the other family members after paying attorneys' fees and costs.¹¹⁷ The remaining five family members and the estate then settled with the hospital for the sum of \$50: \$10 for each plaintiff.¹¹⁸ The plaintiffs then all nonsuited their claims against the hospital, proceeding to trial against the physician.¹¹⁹ The daughter subsequently nonsuited her claim against the physician, leaving the

115. *Id.* See generally *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002).

116. *Utts*, 81 S.W.3d at 825.

117. *Id.*

118. *Id.* at 826.

119. *Id.*

remaining family members and the estate as the remaining plaintiffs at trial.¹²⁰

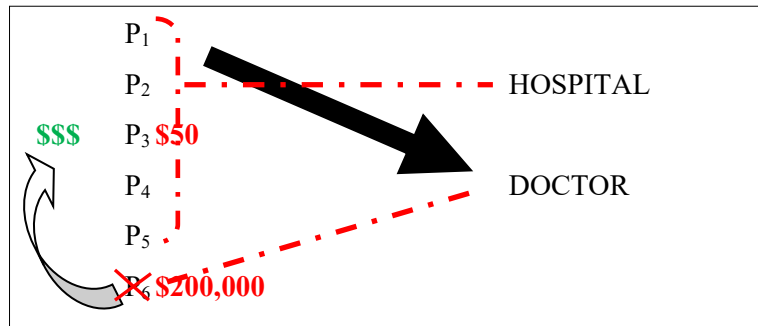


Figure 5: Settlement credit defeating scheme in *Utts*

The physician filed his written election seeking a dollar-for-dollar credit of the full \$200,000 settlement.¹²¹ The family members objected, arguing that they were the only Chapter 33 “claimants” remaining in the suit, and as a result, the physician should be entitled to only a \$10 credit for each plaintiff.¹²² The Supreme Court of Texas, in a new proposition of law, held that a non-settling defendant may put on evidence that a non-settling plaintiff benefitted from another settling plaintiff’s proceeds, entitling the non-settling defendant to a credit.¹²³ From there, the burden shifts to the non-settling plaintiff to prove that they did not receive a benefit from the settlement.¹²⁴ As stated by the Court, a “[n]onsettling part[y] should not be penalized for events over which [it has] no control.”¹²⁵

Despite the holding in *Utts* that the benefits received by distinct derivative plaintiffs may be considered for settlement-credit avoidance schemes, the general rule remains firm—when applying settlement credits, each derivative plaintiff asserts a separate claim for their own losses caused by another person’s injury or death.¹²⁶ Grouping all derivative plaintiffs together as one claimant so that one plaintiff’s settlement wipes out another plaintiff’s claims is contrary to Texas law and the legislative intent of Chapter 33.¹²⁷

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 829.

124. *Id.*

125. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 928 (Tex. 1998).

126. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012 (West 2017).

127. Compare *Utts*, 81 S.W.3d at 829 (holding a claimant “means all family members suing for damages arising from another family member’s injury or death”), with CIV. PRAC. & REM. § 33.012 (stating that each derivative plaintiff is a claimant).

E. Assigning Liability

With the claimant's total recoverable damages, the last step to calculating proportionate responsibility is assigning liability to each defendant. Under § 33.013(a), "a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed."¹²⁸ The following illustration shows the non-settling defendant's liability using the same facts from *Figure 4*:

<u>Jury Award:</u>	
\$4,000,000 Total Damages	
<u>Jury Finding:</u>	
Claimant - 20% responsible	
Non-settling Defendant - 40% responsible	
Settling Party (\$250,000) - 40% responsible	
\$3,000,000 - Economic Damages (\$600,000) - Claimant's Negligence (\$187,500) - Dollar-for-Dollar Credit \$2,212,500 - Total Recoverable Econ. Dmg's	\$1,000,000 - Noneconomic Damages (\$200,000) - Claimant's Negligence (\$62,500) - Dollar-for-Dollar Credit \$737,500 - Net Noneconomic Damages
<u>§ 74,301 Damages Cap Applies:</u>	
\$250,000 - Total Recoverable Non-Econ. Dmg's	
<u>Total Recovery After Damages Cap: \$2,462,500</u>	
<u>Non-Settling Defendant Liability: \$985,000</u>	

Figure 6: Defendant liability assignment illustration

F. Joint and Several Liability

In addition to Subsection (a), defendants can become jointly and severally liable for all recoverable damages by the claimant if (1) the defendant's percentage of liability is greater than 50%; or (2) "the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in" various provisions under the penal code.¹²⁹ In considering any intentional tort cases, it is a good idea to review the list of penal code violations under § 33.013(b)(2) as joint and several liability may provide significant leverage, and liquidity, in the case.

The greatest changes that joint and several liability laws faced in the 2003 amendments were the consequences that flowed from the expansion of responsible third-party provisions under Chapter 33. The new definition

128. CIV. PRAC. & REM. § 33.013(a).

129. *Id.* § 33.013(b)(1)-(2).

allows “any person”—known or unknown—to be designated,¹³⁰ and low designation standards for timely filed motions mean more parties can appear on the jury charge without bearing any legal liability to the plaintiff.¹³¹ The increase in responsible third parties not only dilutes a defendant’s responsibility but makes it much more difficult for the defendant to be found 51% or more responsible to trigger their joint and several liability.

For claims where a defendant is jointly and severally liable for all recoverable damages, they are responsible for the entire amount, regardless of whether other liable defendants pay or not.¹³² When a defendant who is jointly and severally liable under § 33.013 pays more than his percentage of liability, he has a right to contribution against every other liable defendant to the extent that the liable defendant has not paid their percentage of the damages as found by the jury.¹³³ Fortunately in these circumstances, the burden of collecting judgments from several codefendants shifts from the plaintiff to the jointly and severally liable defendant.¹³⁴

V. CONCLUSION

Understanding how to apply and calculate proportionate responsibility can cause special headaches for practitioners attempting to assess and maximize the value of a potential claim. Statutory limitations on recovery and rules promoting the dilution of defendants’ liability have had a substantial impact on who actually gets paid in civil lawsuits.¹³⁵ However, knowing the framework and rules developed under Chapter 33 provides a leg up in case evaluation and trial strategy now that you can answer some of the most important questions in tort law: who pays, who receives, and by how much?

130. *Id.* § 33.011(6) (emphasis added).

131. *Id.* § 33.004(g) (stating that defendant’s motion to designate responsible third parties must satisfy the pleading requirements of the Texas Rules of Civil Procedure to be granted).

132. *Id.* § 33.013(b).

133. *Id.* § 33.015(a).

134. *Id.*

135. *See supra* Part IV (discussing the calculation of recoverable damages and the determination of who gets paid those damages).