

# **SHIFTING LIABILITY**

**RANDALL O. SORRELS  
&  
BRANT J. STOGNER**

**ABRAHAM, WATKINS, NICHOLS, SORRELS, AGOSTO & FRIEND  
800 Commerce Street  
Houston, Texas 77002  
(713) 222-7211**

**State Bar of Texas  
33<sup>RD</sup> ANNUAL: ADVANCED ESTATE PLANNING AND PROBATE  
COURSE  
June 10-12, 2009  
Houston**

**CHAPTER 24**

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. DOES CHAPTER 33 APPLY?.....	1
III. CPRC §33.004 – DESIGNATION OF RESPONSIBLE THIRD PARTY.....	1
IV. JOINT AND SEVERAL LIABILITY .....	2
V. BACKGROUND .....	2
VI. 2003 HOUSE BILL 4 CHANGES .....	3
VII. ATTENTION DEFENSE LAWYERS: TIMING IS EVERYTHING .....	4
VIII. STATUTE OF LIMITATIONS DEFENSE: PLAINTIFFS’ LAWYERS BEWARE .....	5
a. General Rule.....	5
b. Statute of Repose.....	5
c. Medical Malpractice Cases .....	6
d. Legal Malpractice - Statute of Limitations? .....	7
e. Naming a Decedent.....	7
IX. PLEADING REQUIREMENTS.....	7
X. FEDERAL COURT DESIGNATION – SUBSTANTIVE OR PROCEDURAL? .....	7
XI. PLAINTIFF’S PROCEDURE .....	8
XII. CRIMINAL ACTIVITIES .....	8
XIII. CONCLUSION .....	8

# SHIFTING LIABILITY: RESPONSIBLE THIRD PARTIES

## I. Introduction

In Texas, civil defendants are able to shift liability to Responsible Third Parties (“RTPs”). Practitioners on both sides of the “v” need to be aware of the rules and the issues that can arise from the designation of a RTP. This paper will discuss the current statute that allows for designation of RTPs, the evolution of RTP practice, the scant amount of case law that focuses on RTPs, and will address some of the issues that have come to the forefront in Texas jurisprudence since the enactment of the current RTP statute.

## II. Does Chapter 33 Apply?

Chapter 33 is the vehicle that allows defendants to shift their liability to RTPs. As this paper will discuss, using Section 33.004 is more attractive and advantageous to a defendant than normal third-party practice. As such, a defendant seeking to shift liability pursuant to this statute must first determine whether the statute applies to the particular case. The Texas Civil Practice & Remedies Code states Chapter 33 applies to any cause of action based on tort in which a defendant, settling person, or RTP is found responsible for a percentage of the harm for which relief is sought. Additionally, the Texas Civil Practices & Remedies Code provides that Chapter 33 applies to any action under the Texas DTPA.

The Code states that Chapter 33 does not apply to an action to collect workers’ compensation benefits under the workers’ compensation laws of Texas, actions against an employer for exemplary damages arising out of the death of an employee, a claim for exemplary damages included in an action to which Chapter 33 otherwise applies, or a cause of action for damages arising from the manufacture of methamphetamine.

## III. CPRC §33.004 - Designation of Responsible Third Party

At first glance, the RTP statute appears to be about as clearly written as one could ask from the Texas Legislature. The current version of Chapter 33.004 of the Texas Civil Practice & Remedies Code (entitled “Designation of Responsible Third Party”) was enacted by the 78<sup>th</sup> Texas Legislature in 2003 and can be summarized as follows:

- Defendants can designate a RTP by filing a motion for leave to designate that person as a RTP. A defendant does not have to assert a third-party action against a party in order to have that party’s conduct submitted to a jury for apportionment of fault as a RTP. No other action is necessary by the defendant if the court grants the motion for leave to designate.
- “Responsible third party” is defined as “any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.” This includes entities as well, but “does not include a seller eligible for indemnity under Section 82.002.”
- The motion to designate a RTP must be filed on or before the 60th day before the trial date, unless the court finds good cause to allow the filing of a later motion.
- The court must grant a timely motion for leave to designate a RTP unless another party files an objection to the motion for leave within 15 days after the motion is served.
- Even with an objection, the court must grant leave to designate, unless the objecting party establishes that the defendant did not plead sufficient facts and, if given leave to replead, the defendant again fails to plead sufficient facts concerning the alleged responsibility of the party to satisfy the pleading requirements of the Texas Rules of Civil Procedure.
- A defendant can designate any party as a RTP, including: employers protected by the Texas Workers’ Compensation Act (“TWCA”), bankrupt parties, parties over whom the court has no jurisdiction, and even unknown and unnamed parties.
- An unknown criminal who committed a criminal act that is alleged to have been the cause of the loss or injury can be designated under certain additional circumstances.
- An unknown person can be designated as a Jane

Doe or John Doe RTP until the person's identity is known.

- After adequate time for discovery, a motion to strike the designation of a RTP is allowed if there is no evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damages.
- If the court grants a defendant's motion for leave to designate a RTP, a claimant can then join the RTP no later than 60 days after the designation, even if such joinder would otherwise be barred by limitations.

However, even in light of the clear language of the 2003 RTP statute, there is more than meets the eye. While there is not a wealth of case law addressing the 2003 RTP statute, the appellate courts recognize that there are indeed nuances in the statute that need interpretation. In addition to the issues inherent in the relatively new statute, practitioners need to be aware of the significant changes that the 2003 amendments bring to a defendant's ability to shift liability.

#### **IV. Joint and Several Liability**

The RTP designation rule has evolved from a variety of Texas contribution schemes – that is “the payment by each tortfeasor of his proportionate share of the plaintiff's damages to any other tortfeasor who has paid more than his proportionate part.” *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 859 (Tex. 1977). A review of the various contribution statutes requires an analysis of the development of joint and several liability in Texas. Indeed, without joint and several liability, there can be no contribution. Although a complete history of joint and several liability law in Texas is beyond the scope of this paper, it is fair to summarize the current state of Texas law as a proportionate responsibility system that allows joint and several liability if a defendant's percentage of responsibility is greater than 50%, or if certain criminal acts are involved with the defendant's conduct. *See* Tex. Civ. Prac. & Rem. Code § 33.013.

Proponents of the RTP designation statute argue that without this law, a jury would not be permitted to consider the fault of all those responsible for the incident or injury. They argue that the fact-finder should be allowed to consider all parties when apportioning fault, even parties that could never be legally responsible for making the injured victim whole.

Opponents of the RTP designation statute argue the responsible third party legislation turns “jury submission of proportionate responsibility into a free-for-all where the defendant could freely add anyone,

even unknown parties, to the mix.” David Holman, *House Bill 4 Symposium Issue: Responsible Third Parties*, 46 S. Tex. L. Rev. 869, 880 (2005). Indeed, a party designated as a RTP, and not joined as a defendant, will never be responsible for satisfying any portion of a plaintiff's damages. *See* Tex. Civ. Prac. & Rem. Code § 33.004(i). Additionally, a defendant is now allowed to designate parties that cannot be held liable or legally responsible for the plaintiff's injuries, such as unknown parties, bankrupt parties, and immune parties.

Opponents also argue that the entire reason the RTP designation statute exists is to allow defendants to escape joint and several liability. *See* Holman, *supra* at 870. By allowing defendants to shift liability to RTPs, the likelihood that defendants will be forced to satisfy the entire judgment pursuant to joint and several liability is greatly reduced. This also has the effect of reducing the likelihood that the injured victim will ever be made whole.

A jointly and severally liable defendant that has paid more than its percentage share of damages has a right of contribution for the overpayment against the other liable defendants. However, this means that the jointly and severally liable defendant is liable for all of plaintiff's damages and is now seeking reimbursement, essentially. It is advantageous for defendants to simply avoid imposition of joint and several liability by shifting liability to RTPs, as opposed to seeking reimbursement after the fact for overpayment.

The current RTP statute allows defendants to designate virtually any party and have that party's conduct submitted to the fact-finder, along with the conduct of the plaintiff, any other defendants, and any settling persons. *See* Tex. Civ. Prac. & Rem. Code § 33.003(a). As a general rule, as long as the defendant's percentage of responsibility is not greater than 50%, that defendant can avoid joint and several liability. *See* Tex. Civ. Prac. & Rem. Code § 33.013(b)(1); *Bay Rock Operating Co. v. St. Paul Surplus Lines Ins. Co.*, 2009 Tex. App. LEXIS 2300, \*38-40 (Tex. App. -- San Antonio Apr. 1, 2009, no pet. h.) (holding that defendant is jointly and severally liable because the jury apportioned 51% fault to defendant and 49% to a RTP, regardless of the fact that it was a single-defendant case and regardless of whether the defendant can seek contribution from that RTP). Thus, it is extremely advantageous for a defendant to shift as much liability as possible to RTPs in an effort to avoid joint and several liability.

#### **V. Background.**

While the “traditional” third party practice has been alive and well for many decades, the term “responsible third party” was first introduced into our statutory system in 1995. The 1995 Tort Reform

hearings began with a call from then Governor George W. Bush for reformation for Texas' joint and several liability laws in Texas. *Tort Reform of 1995: Hearings on Tex. H.B.32 Before the Senate Comm. On Economic Development*, 74<sup>th</sup> Leg., R.S. 2 (Feb. 2, 1995), reprinted in 3 Texas Tort Reform: The Legislative History, at II-11-12 (1995) (statement of Governor George W. Bush). Pursuant to the 1995 statute, the Texas Legislature raised the percentage requirement needed to hold a defendant jointly and severally liable to 51%. Act of May 8, 1995, 74th Leg., R.S., ch. 136, 1, 1995 Tex. Gen. Laws 971, 974 (amended 2003) (current version at Tex. Civ. Prac. & Rem. Code § 33.013).

Additionally, the 1995 statute allowed an existing defendant in a case to join a RTP in the lawsuit. Act of May 8, 1995, 74th Leg., R.S., ch. 136, 1, 1995 Tex. Gen. Laws 971, 972-73 (amended 2003) (current version at Tex. Civ. Prac. & Rem. Code § 33.004). Under the 1995 statute, a RTP could not include an employer that is protected by the TWCA, a bankrupt party, or a seller eligible for indemnity under Section 82.002 of the Texas Civil Practice & Remedies Code. In order to be a RTP under the 1995 statute, the RTP had to be a party over which the court had jurisdiction. Additionally, the RTP had to be a party against whom the plaintiff had a cause of action and who was potentially liable to the plaintiff. Thus, under the 1995 statute, a RTP could not be a party immune by statute, a party with parental immunity, a governmental unit protected by sovereign immunity, a party safe from liability by judgment, or a party whose liability was limited by contract. In late 2003, this all changed.

## VI. 2003 House Bill 4 Changes.

The 2003 changes to Section 33.004 provide some significant changes to the original language and some significant advantages to defendants for suits filed after September 1, 2003. For example, joinder is no longer required – just designation. *Bueno v. Cott Beverages*, 2005 WL647026 (W.D. Tex., 2005). Now, a defendant can wait until nearly the last minute to designate a RTP, and it is difficult to imagine a scenario where a properly filed, timely pled, and good faith motion to designate a RTP would be denied under the current rules. Thus, a defendant can wait until nearly the end of the litigation to designate a RTP in an attempt to shift liability. Remember, the current statute simply requires filing a motion to designate 60 days prior to trial. In addition, the current statute even allows an extended time period to file a motion to designate, if the defendant can show good cause. However, pursuant to the Texas Rules of Civil Procedure, all parties must disclose the existence and identity of potential RTPs in response to requests for disclosures. *See* Tex. R. Civ. P. 194.2 (requiring the disclosure of responsible third parties); Tex. R. Civ. P. 193.5 (requiring supplementation of discovery

responses reasonably promptly after the party discovers the necessity to supplement).

Also, and probably the biggest concern for plaintiffs, the 2003 changes allow defendants to designate parties not subject to suit. This is a significant change from the 1995 statute, as discussed above. This means that a defendant can now simply designate, *inter alia*, unknown parties who will never have their story told to the jury, bankrupt entities, governmental units that are immune, and employers protected by the TWCA. These are parties that will never be able to satisfy a judgment in favor of a plaintiff.

Indeed, the 1995 statute specifically exempted the plaintiff's employer (if the employer is a subscriber to Texas Workers' Compensation Insurance) and a bankrupt person or entity from RTP status. In 2003, when the Legislature removed these exemptions, it paved the way for defendants to designate immune employers and bankrupt persons as RTPs. Allowing employers that are immune pursuant to the TWCA to be designated as RTPs is a significant departure from prior Texas law. Not only was this a reversal of the statute, but it was also a reversal of Texas common law. *See Varela v. Am. Petrofina Co. of Tex., Inc.*, 658 S.W.2d 561, 561-62 (Tex. 1983) (holding that an employer's negligence may not be considered in a third-party negligence action brought by an employee arising out of an accidental injury covered by workers' compensation insurance). The reasoning behind the rule in *Varela* was that since the plaintiff is barred from suing his employer under the no-fault workers' compensation scheme, it would be unfair for the defendant to try and shift the burden of loss to the employer. *Id.* at 562. After the 2003 changes, the current system allows defendants to designate the immune employer and allows for the unfair scenario described by the Texas Supreme Court in *Varela*. *See id.* Seemingly in recognition of the inequity of this situation, the Legislature did include a provision that allowed for a reduction of the workers' compensation carrier's subrogated lien in accordance with the percentage of fault attributed by the fact-finder to the employer. *See* Tex. Lab. Code § 417.001(b).

In addition, and perhaps the most shocking of all the changes, is the defendant's new ability to designate unknown parties that may or may not even exist. *See* Tex. Civ. Prac. & Rem. Code § 33.004(j) and (k). Indeed, during the hearings on the amendments to the RTP statute, Representatives Mabry and Gattis discussed how much evidence was needed to submit the conduct of the "unknown RTP" to the jury. *See Tort Reform of 2003: House Floor Debate*, 78th Leg., R.S. (March 27, 2003), reprinted in 2 Legislative History of Texas H.B.4: The Medical Malpractice & Tort Reform Act of 2003, at 879-80 (2003) (discussion between Representative Gattis and Representative Mabry).

During the hearings, Rep. Mabry posed a hypothetical fact scenario where the defendant claims that an unknown driver in a white car ran the defendant off the road and asked Rep. Gattis whether that was enough evidence to allow the unknown party to be submitted to the jury as a RTP. *Id.* at 879. Rep. Gattis replied that it could be sufficient evidence even though the white car may have never existed and he stated that the jury “gets to make that determination.” *Id.* at 879-80. Rep. Mabry responded by asking, “So you trust the jury – the determination of discretion in that situation, but you don’t in others such as awarding damages, isn’t that right?” *Id.* at 880. In any event, the RTP statute expressly allows for the inclusion of unknown parties as RTPs.

The inclusion of all these new parties as RTPs will also allow defendants to escape joint and several liability with greater frequency, especially in light of the 51% requirement needed to hold any defendant jointly and severally liable. With regards to shifting liability, the RTP statute is a valuable tool for that purpose.

Seemingly, the only bones that were thrown to the plaintiffs’ bar in 2003 were: (1) an added 60-day extension of the statute of limitations for the plaintiff if the plaintiff’s claim would otherwise be barred by limitations; and (2) the legislature reduced to writing the ability of a party moving to strike the designation of a RTP on the grounds there is no evidence the designated person is responsible for any portion of the claimant’s alleged injury or damages. In essence, this is very similar a no-evidence motion for summary judgment standard – and is not significantly different from the requirement that there be sufficient evidence to submit a party’s name to the jury in the court’s charge. In the end, the RTP statute is a significant advantage to defendants seeking to shift liability.

## **VII. ATTENTION DEFENSE LAWYERS: Timing is Everything.**

A defense lawyer should add to his or her initial evaluation checklist the consideration of the designation of a RTP. Just as there are strict deadlines on motions to transfer venue and special appearances, there are also strict deadlines with certain RTPs. The rule requires:

- a. In the event the defendant believes an unknown person committed a criminal act that was the cause of the loss or injury that is subject to the lawsuit, the defendant must file the designation motion no later than 60 days after the filing of defendant’s original answer; and
- b. In a non-unknown criminal case, the motion must be filed on or before the 60<sup>th</sup> day before trial unless the court finds good cause to allow the motion to be filed at a later date.

This rule is important because if the trial court denies a defendant’s motion for leave to designate a person as a RTP, mandamus may not be a remedy, and the case may be submitted to the jury without any reference to any RTPs in the jury questions. In *In re: Unitec Elevator Services Co.*, 178 S.W.3d 53 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2005, no pet.), the First Court of Appeals denied Unitec’s mandamus not only because of timing issues on some RTPs, but also because Unitec had an adequate remedy by appeal with respect to the trial court’s denial of its motion for leave to designate another potential RTP.

In *Unitec*, the plaintiffs alleged they sustained personal injuries while working for Southwestern Bell Telephone Company when the elevator in which they were riding fell three stories. Plaintiffs alleged Unitec Elevator Services Company was responsible for the maintenance of the elevator and had knowledge that the elevator was having mechanical failures. Unitec attempted to designate three potential RTP’s – Southwestern Bell, unknown vandals, and CenterPoint Energy.

Unitec first designated Southwestern Bell Telephone Company as a responsible third party, but the trial court sustained the plaintiffs’ objection to Unitec’s motion for leave to designate because Unitec failed to plead sufficient facts to support its allegations against Southwestern Bell. Unitec then sought mandamus relief. The First Court of Appeals focused on the original order denying Unitec’s motion for leave to designate and held Unitec had an adequate remedy by appeal with respect to the trial court’s denial. The court did note mandamus may be appropriate under certain circumstances and cited *In re Arthur Anderson LLP*, 121 S.W.3d 471 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2003, orig. proceeding), which dealt “with the complex, intertwined facts surrounding the collapse of a major corporation [Enron],” as opposed to “a relatively straight forward personal injury case.” *Unitec*, 178 S.W.3d at 64.

Unitec then filed a second motion for leave to designate unknown vandals as RTPs. However, Unitec did not meet the procedural requirements for filing within 60 days after the filing of the defendant’s original answer as required under Section 33.004(j) for unknown RTPs. The appellate court noted the requirement of subsection (j) is clear and unambiguous, and requires a defendant to file an answer alleging an unknown person committed a criminal act that was a cause of the loss or injury that is subject to the lawsuit no later than 60 days from the *original* answer. Because Unitec did not timely file an answer containing the required allegations, Unitec was precluded from designating unknown vandals as responsible third parties.

Finally, Unitec later designated CenterPoint

Energy as a RTP. Plaintiffs objected that Unitec did not timely file its motion and designation because it was filed within 60 days of trial. The trial court sustained plaintiffs' objections to the CenterPoint designation, and the First Court of Appeals held the trial court did not abuse its discretion by denying Unitec's motion for leave to designate CenterPoint. Thus, defendants seeking to shift liability to RTPs must pay close attention to the procedural timelines and comply with the statute when designating RTPs.

**PRACTICE TIP:** A defense lawyer should quickly analyze a new lawsuit to determine if there were any unknown criminals that may have participated in causing the loss or injury, and file the appropriate pleadings within the 60 days of filing the original answer.

**PRACTICE TIP:** A plaintiff's lawyer should quickly join a newly designated RTP as a defendant in order to ensure that adequate discovery is conducted with respect to that party's conduct. This will also ensure a real defense by that party, since unless joined as a defendant, a RTP has no risk in failing to defend allegations against him, her, or it as a RTP. Of course, there are other factors to consider, such as whether the plaintiff can recover from the RTP, even if joined as a defendant.

### **VIII. Statute of Limitations Defense – Plaintiffs' Lawyers Beware.**

#### **a. The General Rule.**

The 2003 amendments to Section 33.004 do help plaintiffs avoid a statute of limitations defense when a responsible third party is designated by a defendant. Basically, if the defendant designates a RTP, which the plaintiff failed to file suit against within the applicable limitations period, the plaintiff is then granted 60 days to join that RTP as a proper defendant. This savings provision operates to curtail the gamesmanship that can occur due to the defendant's ability to designate RTPs late in the litigation.

Beware, if the plaintiff proceeds to trial without joining that RTP as a proper defendant, the statute precludes the plaintiff from recovering any damages from the RTP. Section 33.004(i) provides that a finding of fault against a RTP does not impose liability on that person or entity, and the fault finding may not be used in any other proceeding on any theory to impose liability on that person or entity. Thus, if the plaintiff ever wants to recover from the RTP, the plaintiff must join the RTP as a defendant; if the limitations period has already expired against the RTP, the plaintiff must act quickly. Otherwise, the "Responsible Third Party" will not bear any real responsibility at all.

In *Russell v. Wendy's International, Inc.*, 219 S.W.3d 629, 642 (Tex. App. – Dallas 2007, pet. dismissed), the Dallas Court of Appeals held Section 33.004(e) is a savings clause that does not allow a RTP that was properly joined as a defendant in the case to successfully assert a defense of statute of limitations.

In *Russell*, plaintiff was employed as a service technician by Wendy's (a non-subscriber). After receiving an electrical shock at work, plaintiff timely filed suit against an electrical contractor ("Bugle"). After limitations had run, Bugle filed a third party action against Wendy's, contending Wendy's was a RTP. Within 60 days, plaintiff sued Wendy's, which promptly filed an answer asserting a statute of limitations defense. (Note: Wendy's was "joined" and not "designated" by a motion. This suit was applying the pre-2003 H.B.4 amendments. The current statute now simply allows a designation and does not require joinder by a defendant.)

Wendy's asserted that Chapter 33 required a timely motion and order to join a RTP, and because there was no such motion filed, plaintiff could not use Section 33.004(e) to extend his limitations as to Wendy's. The trial court granted summary judgment on that basis. Applying the pre-2003 amendments to Section 33.004, the appellate court found both (1) Bugle's filing of the third-party action against Wendy's, and (2) plaintiff's subsequent initiation of suit against Wendy's were permissible, notwithstanding the limitations argument. Plaintiff, therefore, was permitted to sue a joined RTP as a defendant, even if the statute of limitations period had expired.

Today, a plaintiff better join the RTP (that is protected by limitations) within 60 days of the court granting a defendant's motion for leave to designate that RTP. This is the only way to recover against the RTP. There may be strategic reasons for not joining the RTP, but the failure to join a RTP should be an intentional decision, and not an oversight.

#### **b. Statute of Repose.**

The "statute of limitations" versus the "statute of repose" issue has not been addressed by the Texas Supreme Court, but the San Antonio Court of Appeals addressed the issue in *Pochucha v. Galbraith Eng'g Consultants, Inc.*, 243 S.W.3d 138 (Tex. App. – San Antonio 2007, pet. granted). In this case, the plaintiffs purchased a home and later noticed a water leak after it rained. Engineers who inspected the house indicated that the French drain system under the foundation of the house was not properly designed and installed. Plaintiffs sued the construction company, which later filed a motion for leave to designate Galbraith (an engineering consultants firm involved in the original design of the French drain system) as a RTP. Notwithstanding the fact that over ten years had elapsed

since the time Galbraith was involved, plaintiffs joined Galbraith as a defendant.

Galbraith moved for summary judgment seeking dismissal of the plaintiffs' claim on the ten-year statute of repose defense set forth in Section 16.008(a) of the Texas Civil Practice & Remedies Code. Galbraith argued because Section 16.008 is a statute of repose and Section 33.004(e) refers to "limitations," Section 33.004(e) does not apply to extend the ten-year period contained in Section 16.008.

The San Antonio Court held Chapter 33 "applies to any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought." The court concluded when the legislature used the word "limitations" in Section 33.004(e), it was meant to apply to all limitations periods, without regard to whether those periods were determined to be based on statutes of repose or statutes of limitations.

More recently, in *Boenig v. StarnAir, Inc.*, 2009 Tex. App. LEXIS 1209, \*1-2 (Tex. App. – Fort Worth Feb. 19, 2009, no pet. h.), the court also held that the legislature intended the Section 33.004(e) savings clause to apply to statutes of repose. This case also dealt with a ten year statute of repose found in Chapter 16 of the Texas Civil Practice & Remedies Code. Using statutory construction, the court held that Chapter 33 allowed the plaintiff to join a RTP (StarnAir) as a defendant, even though StarnAir would have otherwise been protected by a statute of repose.

This is at least some good news for plaintiffs. This means that through Chapter 33, plaintiffs can join RTPs as defendants, even if a statute of repose would otherwise protect that RTP as a normal defendant. Indeed, statutes of repose are designed to provide some ending point for which claims may be asserted. However, if a defendant seeks to avoid liability by designating a RTP that is protected by a statute of repose, plaintiffs can join that RTP as a defendant and defeat any limitations argument.

### **c. Medical Malpractice Cases.**

Health care providers are arguing that a strict interpretation of Section 74.251 of the Texas Civil Practice & Remedies Code trumps the RTP designation savings provision, which should allow a health care provider to be brought in after the statute of limitations has expired. Section 74.251 states: "Notwithstanding any other law and subject to Subsection (b), no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or hospitalization for which the claim is made is completed . . ." Tex. Civ. Prac. & Rem. Code §74.251. A review of the legislative history regarding the

intended interaction of Section 33.004(e) with Section 74.251 indicates that a plaintiff should be allowed to join a health care provider RTP after the statute of limitations has expired:

Sen. Hinojosa:

I have another question and this one deals with Article 4. When a defendant names a responsible third party as I understand it, under House Bill 4, the plaintiff has 60 days to bring the third party into the lawsuit, even if limitations would otherwise have run against that person. That's under § 33.004(e), page 20, line 27 to page 21, line 7. Is that true in a medical malpractice claim too? Is that also the same thing with medical malpractice, because on page 63 of the bill it seems to say that the two-year statute in those – the two-year statute of limitations in those cases applies notwithstanding any other law? What does that mean?

Sen. Ratliff:

Well – the short answer is that it does, in fact, apply. If health care providers are going to have the benefit of the designation of a responsible third party, then they – then they have to be – they have to abide by the same rules under that provision and so this 60-day provision would apply in health care liability claims.

*S. Conf. Comm. Rep. on H.B. 4*, S.J. of Tex., 78th Leg., R.S. 5005 (2003).

In *Kimbrell v. Molinet*, the court considered the trial court's denial of summary judgment in favor of two doctor defendants on the basis that the plaintiff failed to bring suit against them within the two-year limitations period in Chapter 74 of the Texas Civil Practice & Remedies Code. 2008 Tex. App. LEXIS 9684 (Tex. App. – San Antonio 2008, no pet.). In this case, the plaintiff sued several parties, including his podiatrist. *Id.* at \*2. The defendant podiatrist designated two of plaintiff's doctors as RTPs, but did so outside of the two-year limitations period for bringing medical malpractice claims. The plaintiff then joined the doctors as defendants within the sixty-day time period provided by Chapter 33. The doctors moved for summary judgment claiming that Chapter 74 required suit be initiated within two years of the injury, regardless of the savings provision in Section 33.004. The trial court denied the doctors' motion and the parties proceeded on an agreement for interlocutory appeal. *Id.* at \*3.

On appeal, the court held that because the

"notwithstanding any other law" language of Section 74.251 imposes an absolute two-year limitations period on health care liability claims, the trial court erred in denying the motions for summary judgment. *Id.* at \*8-9. The court reversed the trial court's order and rendered judgment dismissing plaintiff's claims against the doctors. *Id.* at \*9.

Thus, it appears that claims arising under the Medical Liability Act are not subject to the savings provision found in Section 33.004(e), at least according to the San Antonio court. According to this court, it seems the medical provider defendants get all the advantages of the RTP statute, yet they are exempt from the savings provision of Section 33.004(e). This holding is clearly at odds with Senator Ratliff's above-cited testimony regarding the applicability of Section 33.004(e) to health care liability claims.

Note, however, the expert report filing requirements are not affected by Section 33.004 and there are many suggestions on how to address the filing requirements if a plaintiff is in any way concerned about the doctor being accused while unrepresented. Because the trial court may have full discretion in allowing a RTP to be designated, the plaintiff's lawyer should consider working with the potential RTP healthcare provider/defendant to make the rules work in their favor to get the RTP dismissed. Whether a court will hold the expert report filing requirements apply to the movant and are required under Section 33.004(l) is still an undecided question.

#### **d. Legal Malpractice – Statute of Limitations?**

One of the most common legal malpractice allegations asserted against plaintiffs' lawyers is the failure to timely file suit within the appropriate statute of limitations period. Recall that to prevail in a legal malpractice claim, the plaintiff must show the following:

- (a) Plaintiff must prove there is duty owed to him by the defendant;
- (b) A breach of that duty;
- (c) The breach proximately caused the plaintiff's injuries; and
- (d) Damages occurred.

*McKinley v. Stripling*, 763 S.W.2d 407 (Tex. 1989). The plaintiff also has the burden to prove his or her suit would have been successful but for the negligence of his attorney, and "to show what amount would have been collectible had he recovered the judgment." *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1974, writ

ref'd n.r.e.).

If a lawyer is sued for failing to file within an appropriate limitations period, that lawyer should designate the actual party (who should have been sued within the appropriate limitations time period) as a RTP. This should force the plaintiff to then join that RTP (the original tortfeasor, for example) and the limitations claim is defeated. Therefore, the accused attorney may ultimately be cleared of any financial responsibility for any original error that may have been made because the plaintiff would have to recover from the original tortfeasor.

As an additional note of interest, if the defendant/attorney designates the original tortfeasor as a RTP, and the legal malpractice plaintiff's attorney fails to timely join the original tortfeasor within the 60-day window, the defendant attorney should then consider designating the legal malpractice plaintiff's attorney as an RTP. What a circle this may create!

#### **e. Naming a decedent.**

Another question that hasn't been addressed is who to name if a RTP has died. "Responsible Third Party" is defined as "any person..." A dead person can't be a "person" under Texas law, so what do you do if an estate isn't opened? And what does the plaintiff's lawyer file if the defendant does name a decedent? Does he or she file a special exception or motion to strike? There simply are not any cases addressing this question, yet.

### **IX. Pleading requirements.**

Don't forget about the pleading requirements of Rule 13, which requires attorneys or parties to certify "they have read the pleading, motion or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment." Tex. R. Civ. P. Rule 13.

Additionally, Chapters 9 and 10 of the Civil Practice & Remedies Code also contain similar requirements for pleadings and motions. According to the Texas Supreme Court, with regards to Chapter 10, "the signer of a pleading or motion certifies that each claim, each allegation, and each denial is based on the signatory's best knowledge, information, and belief, formed after reasonable inquiry." *Low v. Henry*, 221 S.W.3d 609, 615 (Tex. 2007). Thus, before filing a motion for leave to designate a RTP, there better be evidence of that RTP's responsibility for the injury or damage, or there better be a likelihood that there will be evidentiary support after a reasonable opportunity for further investigation or discovery. See Tex. Civ. Prac. & Rem. Code § 10.001.

## **X. Federal Court Designation – Substantial or Procedural?**

There is still an outstanding question whether the RTP statute would be applied in a case in federal court. In *Kelly v. Wal-Mart Stores, Inc.*, the Eastern District Court denied a properly joined third-party defendant's motion to dismiss. 224 F.Supp. 2d 1082, 1083 (E.D. Tex. 2002). Looking at the old statute, the court noted, “[h]owever, Federal Rule of Civil Procedure 14(a) also describes when a defendant may join responsible third parties to an on-going civil action and according to Federal Rule of Civil Procedure 1, ‘these rules govern the procedure in the United States district courts in all suits of a civil nature. . . .’ Accordingly, this court may follow Federal Rule of Civil Procedure 14(a) for determining whether Wal-Mart may join Enviro as a third-party defendant to this action.” *Id.* at 1084. The court noted that because no substantive provisions of Texas law were being ignored by the court's ruling, joinder was allowed under the federal rules. *Id.*

The Northern District also looked at the predecessor to the 2003 changes and held “[s]ince section 33.004 of the Code is only a joinder statute, and contribution and indemnity actions are allowed under Sections 33.016 and 33.017, of the Code, ‘no substantive provisions of Texas law are being ignored by this court's ruling’ to use Federal Rule 14 to determine whether to add third-party defendants to the case.” *Marella v. Autozone, Inc.*, 2004 U.S. Dist. Lexis 24890 (N.D. Tex. 2004).

## **XI. Plaintiff's Procedure.**

Section 33.004(e) allows a claimant to “join” a previously designated RTP not later than 60 days after the RTP is designated, assuming that limitations have expired against that RTP. Using a belt and suspenders approach, the plaintiff's attorney should not only amend his or her petition and name the RTP, but should also file a motion for leave to join and serve the RTP as a defendant to comply with the technical language of the statute.

Additionally, just because a court grants a defendant's motion for leave to designate, which is designation itself, does not mean that the plaintiff has lost all hope. Indeed, Section 33.004 allows the plaintiff to move to strike the designation after an adequate time for discovery has passed. According to Section 33.004(l), plaintiffs can move to strike the designation of RTPs 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.” In addition, Section 33.004(l) states that 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.” Accordingly, if the court grants a defendant's motion for leave to designate a RTP over a plaintiff's objection, that plaintiff should still be prepared to file a motion to strike the designation after the completion of discovery. The standard to prevail on such a motion is similar to the no-evidence summary judgment standard found in Texas Rule of Civil Procedure 166a(i).

Additionally, Section 33.003(b), which allows RTPs to be submitted to the jury, states that Chapter 33 “does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.” Thus, even if the court denies the plaintiff's motion to strike the RTP designation prior to trial, the plaintiff should be prepared to object at trial to the submission of the RTP's responsibility in the jury charge.

## **XII. Criminal Activities.**

The criminal activities' provision (Sec. 33.004(j)) raises a number of issues that are not addressed in the statute, including:

- a. Does the crime have to be a felony, or is a misdemeanor going to suffice? (including something ordinarily denoted by a traffic ticket);
- b. Does the unknown person have to have been charged with a crime?;
- c. Does the defendant have to prove the commission of the crime? What is the burden of proof? (Beyond a reasonable doubt vs. by a preponderance of the evidence); and
- d. Does the defendant have to prove all the elements of the crime, including criminal intent?

A broad reading of the statute seems to allow the unknown criminal to be simply submitted to the jury without any of these questions being answered in the affirmative. As such, designating unknown criminals is extremely attractive for defendants seeking to shift liability and avoid imposition of joint and several liability.

## **XIII. Conclusion.**

The 2003 changes to the responsible third party designation statute have provided defendants an opportunity to deflect, shift, and/or decrease their liability exposure, deflect, shift, and/or decrease their potential for joint and several liability, and to assert

various tactical advantages both logistical and temporal. Plaintiffs may take heart in the ability to name a party that should have been earlier named, but was missed for

a variety of reasons. On the whole, however, the defendants have gained greater advantage by the enactment of this statute.