RESPONSIBLE THIRD PARTIES: NEW TRENDS

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LEGAL PUBLICATIONS AND PRESENTATIONS

Responsible Third Parties, 23rd Annual Advanced Evidence and Discovery Course, State Bar of Texas, May 2010
Just Say No: Surviving and Thriving for Small Firms and Solos in The 21st Century, State Bar College Summer School 2008 (July, 2008)
Surviving and Thriving: (Solo Practice and Small Firms), 24th Annual Advanced Personal Injury Law Course (July-August, 2008)
Top Ten Trial Tactics To Do or Not To Do, Prosecuting or Defending a Trucking or Auto Accident Case (September, 2007)
Corporate Representative Depositions, 20th Annual Advanced Evidence and Discovery Course (May, 2007)
PJC Plain Language Project, San Antonio Appellate Practice Section (January, 2007)
The Rhetorical is Ethical: A Defense of Rhetoric and Lawyers, 11th Annual UT Insurance Law Institute (December, 2006)
Jury Charge Perils and Dilemmas, 30th Annual UT Page Keeton Civil Litigation Conference (October, 2006)
Course Director, 2006 State Bar Advanced Personal Injury Law Course (Summer, 2006)
Jury Charge Perils and Dilemmas, 16th Annual UT Conference on State and Federal Appeals (June 2006)
Course Director, 2005 State Bar Advanced Civil Trial Course (Aug.–Nov. 2005)
Jury Charge – Back to the Future, 28th Annual Advanced Civil Trial Course (Aug.–Nov. 2005) (co-author, panel chair)
Methods & Mechanics of a Successful Mediation, 21st Annual Advanced Personal Injury Course (July-Aug. 2005)
Dead on Arrival: Advising When They Don't Have a Cause of Action, State Bar College (July 2005)
The Rhetorical is Ethical: A Defense of Rhetoric and Lawyers, 20th Annual Advanced Personal Injury Law Course (Aug. 2004)
Evidence and Discovery in the Summary Judgment Process, Advanced Evidence and Discovery Course (March-May 2002)
New Discovery Rules, Panel Discussion, University of Texas School of Law (June 1999)
Tort and DTPA Appeals, Advanced Civil Appellate Practice Course, Panel Moderator (Sept. 1998)
Jury Charge: Preservation of Error, Submission Practice After Tort Reform and Inferential Rebuttal, Practice Before the 4th and 13th Courts of Appeals (May 1997)
Court's Charge Update, 19th Annual Advanced Civil Trial Law Course (Aug. 1996)
Court's Charge Update, 12th Annual Advanced Personal Injury Law Course (July 1996)
Court's Charge Update, 12th Annual Litigation Update Institute (Jan. 1996)
Court's Charge Update, 11th Annual Advanced Personal Injury Law Course (June 1995)
Court's Charge Update, 11th Annual Litigation Update Institute (Jan. 1995)
Court's Charge in Auto Collision Cases, Preparing, Trying, and Settling Auto Collision Cases (Oct. 1992)
New Developments in the Pattern Jury Charge, 8th Annual Advanced Personal Injury Law Course (July 1992)
The Court's Charge after Lemos v. Montez, Butterworth's Texas Personal Injury Law Reporter (Dec. 1992)

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RESPONSIBLE THIRD PARTIES

I. 2011 LEGISLATIVE CHANGE TO CPRC SECTION 33.004

On Memorial Day, Governor Rick Perry signed the so-called omnibus tort bill, HB 274. During the session, there were bills introduced in both the House and Senate which would have repealed Section 33.004(e) of the Civil Practice & Remedies Code. Section 33.004(e), as we know, provides that:

If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated a responsible third party. CPRC Sec. 33.004(e).

This legislation was filed in response to perceived abuses in the responsible third party practice. The cases which were said to best exemplify this abuse are Flack v. Hanke, 334 S.W.3d 251 (Tex. App.—San Antonio 2010, pet. filed) and Ream v. Biomet, Inc., a somewhat infamous case pending in the United States District Court, Western District, San Antonio Division, Civil No. SA-10-CA-525-OG. District Judge Orlando L. Garcia has stayed this case pending Supreme Court resolution of Flack v. Hanke. Both cases are addressed later in this paper.

Near the end of the session, the house bill was rolled into HB 274. HB 274 passed in the House, but the bill was modified significantly in the Senate where a compromise, acceptable to both chambers, was reached. The bill as signed by the Governor takes effect September 1, 2011. Rather than repealing Sec. 33.004(e), HB 274 amends Sec. 33.004 by adding Subsection (d), which reads as follows:

(d) A defendant may not designate a person as a responsible third party with respect to a claimant 's cause of action after the applicable limitations period on the cause of action has expired with respect to the responsible third party 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.

II. STATE COURT (Other Than Mandamus)

A. Designating Known Persons: By Timely Motion

A defendant designates a person or entity as a responsible third party by filing a motion for leave. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date. CPRC § 33.004(a).

American Title complains the trial judge erred in not permitting it to designate responsible third parties in accordance with the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (Vernon Supp. 2005). Bomac counters that American Title's designation was not timely. We agree with Bomac. Under section 33.004, a defendant may seek to designate a person as a responsible third party by filing a motion for leave "on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date." TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a).

American Title filed its motion for leave to designate responsible third parties on July 21, 2004. Trial was set for August 2, 2004. American Title's motion was not timely under section 33.004(a), and Bomac filed an objection on July 26, 2004.

American Title argues its motion to designate responsible third parties became timely because the trial dates were extended.

As the trial judge noted when he overruled the motion, "the case was reset on a very limited basis to allow some additional discovery." American Title did not establish good cause for its untimely motion as required by section 33.004. The trial judge did not abuse his discretion by overruling the motion to designate responsible third parties.

Am. Title Co. of Houston v. Bomac Mortgage Holdings, L.P., 196 S.W.3d 903 (Tex. App.—Dallas 2006, pet. granted, judg. vacated, remanded by agreement).

In this case, it appears that the resetting of the trial date would have made the defendant's motion for leave timely. However, given the limited purpose of the reset as expressed by the trial court, the motion for leave to designate remained untimely because the trial setting was continued for the "very limited basis to allow some discovery." Here, at least, the provision of CPRC § 33.004(a) was not given literal application.

B. Designating Unknown Persons: By Timely Answer

If a defendant wishes to designate an unknown person or entity, the defendant must use a different method and a different timetable.

The question we must address to determine if plaintiffs' claims against Stephanie were also barred by limitations is whether Bandy and Breckenridge IGA's amended answer designated Stephanie as a responsible third party.

The statute provides two different methods for designating responsible third parties. *See In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 61 n. 8 (Tex. App.—Houston [1st Dist] 2005, no pet.). If the third party's identity is known, Section 33.004(a) unambiguously requires a timely motion for leave to designate. If the third party's identity is unknown, Section 33.004(j) unambiguously requires the defendant to also timely include a specific allegation in its answer. The legislature clearly distinguished between known and unknown potential third parties and between motions and answers. Because Stephanie's identity was known, she could only be designated as a responsible third party by a defendant with a timely filed motion. Section 33.004, therefore, is inapplicable, and plaintiffs' claims against Stephanie are barred by limitations.

Sheffield v. Begeman, 274 S.W.3d 846 (Tex. App.—Eastland 2008, pet. denied).

C. The Trial Court Must Take Action to Grant the Motion for Leave

What about the case where a defendant files a motion to designate a person as a responsible third party and the plaintiff does not file an objection to the motion for leave to designate on or before the 15th day after the date the motion is served? § 33.004(f) states that in that situation a court shall grant leave to designate. There does not appear to be any discretion for the court not to grant leave when the plaintiff does not timely object. Thus, in that situation, is the leave automatically granted or must the court, nevertheless, enter an order granting the motion?

The plaintiff, as we know, has 60 days from the date a person is designated as a responsible third party to join that person. Timely action allows a plaintiff to revive a claim against the responsible third party which would otherwise be barred by limitations. But from what event does the 60 days run? Where a plaintiff does not object to a motion for leave to designate, is the motion granted as a matter of law after the expiration of 15 days or must the trial court enter an order specifically granting leave to designate even when there is no objection to the designation?

The answer to these questions became critical for a plaintiff in the following case. The trial court entered an order granting the motion for leave to designate almost a year after it had been filed. No objection to the motion had been filed by the plaintiff. The plaintiff amended and added the responsible third party well within 60 days of the granting of the motion for leave but 10 months after the unobjected to motion had been filed.

Valverde claims that although the motion for leave to designate Alert and Beila's as responsible third parties was filed on August 14, 2007, the trial court did not actually grant the motion until June 13, 2008. Accordingly, she had 60 days from June 13, 2008 in which to assert claims against Biela's and Alert. She filed her second amended petition naming Biela's and Alert as defendants on June 16, 2008.

Alert responds that because Valverde did not file an objection to the motion to designate within 15 days from the filing of the motion, the motion was granted as a matter of law on August 29, 2007. In support, Alert cites subsection (f), which states that the trial court "shall grant leave to designate the named person as a responsible third party unless another party files an objection to the motion for leave on or before the 15th day after the date the motion is served." TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(f). Accordingly, Alert argues that Valverde had 60 days from August 29, 2007 in which to join Alert and Biela's.

This court recently analyzed the language of section 33.004 to determine whether a defendant is required to file a motion for leave to designate a person as a responsible third party. *See Ruiz. V. Guerra*, 293 S.W.3d 706 (Tex. App.—San Antonio 2009, no pet. h.). We held that the clear language of the statute unambiguously requires that a motion be filed. *Id.*; *see also Sheffield v. Begeman*, 274 S.W.3d 846, 860 (Tex. App.—Eastland 2008 pet filed). Further, we held that the plain language of the statute requires the trial court to take action by granting the motion. *Ruiz, 293 S.W.3d at 714* ("A plain reading of the statute compels us to hold that such a designation cannot be achieved without both the timely filing of a motion for leave and a court order granting leave to designate the named person.") We based our conclusion on the language of subsection (f) and (h), which demonstrate that the trial court must take action to grant the motion for leave.

Because our reading of the statute compels us to hold that an order granting the motion for leave is required to designate a responsible third party, we cannot agree with the appellees' assertions that either: 1) the motion is granted as a matter of law if no objection is filed, or 2) an order is only required in those instances where an objection is filed. Here, there is an order granting the motion for leave to designate Biela's and Alert as responsible third parties. The order was signed by Judge Sakai on June 13, 2008. Accordingly, Valverde had 60 days from that date in which to join Biela's and Alert. Valverde filed her second amended petition on June 16, 2008 naming Biela's and Alert as defendants, and thus her claims against them were timely.

Valverde v. Biela's Glass & Aluminum Products, Inc., 293 S.W.3d 751 (Tex. App.—San Antonio 2009, pet denied).

D. A Trial Court's Enforcement of a Scheduling Order May be an Abuse of Discretion When it Impairs § 33.004 Joinder

After the deadline to join additional parties had passed in a scheduling order, the defendant filed a motion for leave to designate a responsible third party. The trial court granted the motion for leave. Granting that motion did not make the R.T.P. a party so, arguably, the order did not violate the trial court's scheduling order. The plaintiff, however, then filed an amended petition adding the R.T.P. as a party. Although this joinder was timely under § 33.004, it was not timely under the scheduling order. The trial court refused to allow the joinder and dismissed the plaintiff's claims against the R.T.P. The plaintiff appealed.

We review a trial court's enforcement of a scheduling order under an abuse of discretion standard. In this case, the scheduling order was entered on January 19, 2006. It provided that "[t]he deadline to join additional parties has passed.," On January 30, Dr. Quintana filed his motion for leave to designate Dr. Palomino as a responsible third party. The Appellants filed objections to the motion for leave on February 22; on the same day, the trial court, notwithstanding the language of the Agreed Scheduling Order, granted the motion for leave to designate. Pursuant to the scheduling order, the deadline to file dispositive motions was February 27 and the deadline to amend pleadings was March 17. The Appellants filed their Fourth Amended Original Petition on March 21, adding Dr. Palomino to the lawsuit.

In this case, Dr. Quintana sought leave to designate Dr. Palomino as a responsible third party after the date for joinder had passed under the scheduling order. While the designation of a responsible third party is not equivalent to the joinder of a party, the trial court's refusal to allow the joinder of Dr. Palomino, which was apparently based on the passage of the joinder deadline in the scheduling order, and its subsequent dismissal of the claims against Dr. Palomino, was an abuse of discretion. We sustain this issue.

Moreno v. Palomino-Hernandez, 269 S.W.3d 236 (Tex. App.—El Paso 2008, pet denied).

The Supreme Court used this case to reach the agreed interlocutory appeal in Molinet v. Kimbrell, ---S.W.3d---, 2011 WL 182230 (Tex. 2011), 54 Tex. Sup. Ct. J. *491, stating:* Although the court of appeals did not directly address the relationship between section 33.004(e) and section 74.251(a), it indicated that section 33.004(e) effectively provided an unqualified sixty-day period for joinder of a responsible third party beginning with the date the third party was designated…The ostensible effect of Moreno and the court of appeals' decision in this case are not in accord regarding whether section 33.004(e) effectively establishes a new sixty-day window in which a plaintiff can sue a defendant even if the limitations period in section 74.251(a) has run. We have jurisdiction to clarify the issue "to remove unnecessary uncertainty in the law." *More on Molinet v. Kimbrell shortly.*

E. Much Mischief Results When the Trial Court Permits a (Very) Late Designation

You are in the middle of trial representing a plaintiff who was a passenger in a two-vehicle collision. You have sued only the driver of the other vehicle. The attorney representing that driver has pled generally that the sole proximate cause of that collision are persons or instrumentalities over which defendant had no control, but does not specifically identify your driver. During trial defense counsel introduces evidence of your driver's negligence. After the close of the evidence, but before the case is submitted to the jury, defense counsel seeks to designate your driver as a responsible third party. The judge allows the designation and submits both drivers' negligence to the jury. The jury answers NO to defendant and YES as to your driver (the late-designated R.T.P.). Certainly this result cannot stand, can it?

In this personal injury case arising from a traffic accident, appellant, Juan Jose Hernandez, sued Appellee, Adbedlsalam Atieh, for negligence. After the jury found Atieh's negligence, if any, did not cause the accident, the trial court entered judgment that Hernandez take nothing. In a single issue, Hernandez contends the trial court erred by allowing Atieh to designate a responsible third party after the close of evidence, but before the case was submitted to the jury. Concluding the designation did not result in reversible error, we affirm.

On November 16, 2003, Hernandez was a passenger in the back seat of a vehicle driven by Hector Sisa when the flat-bed tow truck Atieh was driving hit Sisa's vehicle from the rear.

In November 2004, Hernandez sued Atieh, alleging multiple theories of negligence. In March 2006, the case was tried to a jury. In his live pleading, Atieh requested "the Court and Jury to consider the relative damages and conduct of the parties and all tortfeasors, including Plaintiff, and accord Defendant full benefit of Texas Civil Practice & Remedies Code Chapter 33." Atieh also alleged, among other defenses, (1) the incident was caused by parties or instrumentalities over which Atieh had no control, and (2) "another person, persons or instrumentalities were the sole proximate cause of the accident in question and/or the injuries and damages alleged." He did not specify Sisa as a responsible third party.

On March 6, the last day of trial, the following exchange occurred:

> *THE COURT: Yes or no? Is he named as a responsible third party?*
> *MR. MEYNIER:* We designated all responsible third parties. We did not identify him specifically.
> *THE COURT:* Is it-can I just ask you to answer my question? You can make all of these many other arguments about why you think he's designated or why you think they have notice, but did you file a designation of responsible third party and name Mr. Sisa as a responsible third party pursuant to the Remedies Code?
> *MR. MEYNIER:* His name as not specified in that initial answer, no.

By written motion filed the same day, and orally after the parties had rested, respectively, Atieh (1) requested leave to designate Sisa as a responsible third party and (2) requested a trial amendment to that effect. Hernandez objected to the request and objected to including Sisa on the jury charge. Hernandez argued that the amendment contravened Civil Practice and Remedies Code section 33.004 and constituted prejudicial surprise.

The trial court overruled Hernandez's objection and permitted the trial amendment. Hernandez submitted, and the trial court refused, a jury charge requesting a negligence finding solely with regard to Atieh.

In Question No. 1 of the jury charge, the trial court submitted both Atieh and Sisa as persons whose negligence may have proximately caused the accident. A non-unanimous jury answered the question as follows:

Did the negligence, if any, of any of the persons named below proximately cause the occurrence in question?

Answer "Yes" or "No."

(a) Adbedlsalam Atieh *[NO]*
(b) Hector Sisa *[YES]*

In a single issue, Hernandez argues the trial court erred in allowing Atieh to designate a responsible third party after the evidence was closed and before the jury was charged. Thus, although Hernandez rests his argument on Civil Practice and Remedies Code section 33.004, his complaint is directed at inclusion of the question of Sisa's negligence in the jury charge. Assuming, without deciding, that inclusion of the question of Sisa's negligence was error, we conclude the error was harmless.

Submission of an improper jury question can be harmless error if the jury's answers to other questions render the improper question immaterial. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995).

Here, the jury's finding with respect to Atieh rendered submission of Sisa's negligence immaterial.

Once the jury found Atieh's negligence, if any, did not proximately cause the accident, its finding that Sisa's negligence did proximately cause the accident could not have altered the effect of the verdict. *See id*. At 751-52 (holding that any error in submitting claimants' deceased, in addition to defendant, in jury charge was harmless; once jury found defendant was not negligent, its finding that deceased was negligent could not have altered the effect of the verdict); *Sell v. C.B. Smith Volkswagen, Inc.*, 611 S.W.2d 897, 903 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (holding, even if trial court erred in submitting issues on contributory negligence, such error would not warrant new trial because jury did not find defendants liable on primary negligence issues).

Considering the charge in its entirety, we further conclude submission of the question on Sisa's negligence could not have misled or confused the jury. The court instructed the jury, "There may be more than one proximate cause of an event." The court also instructed the jury to allocate percentages of negligence only if it found the negligence of both Atieh and Sisa proximately caused the occurrence (i.e., more than one of the persons named). Therefore, the jury was not misled into believing it had to choose between finding Atieh negligent or finding Sisa negligent.

Finally, the record as a whole demonstrates the submission of the inquiry on Sisa's negligence did not cause rendition of an improper verdict. Throughout the trial, Atieh questioned witnesses to establish Sisa had improperly changed lanes, cutting in front of Atieh's vehicle and stopping suddenly. Therefore we cannot conclude the mere presence of Sisa in the jury question caused the jury to find no liability on Atieh's part.

In sum, the designation of Sisa as a responsible third party with the resultant submission of his name in the negligence question was not reversible error.[FN5]

FN5. If Hernandez is suggesting submission of a responsible third party in the jury charge is per se reversible error when that party was not timely designated under Civil Practice and Remedies Code section 33.004, we disagree. Hernandez relies on *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000); and *Wal-Mart*

Stores, Inc. v. Redding, 56 S.W.3d 141 (Tex. App.—Houston [14th Dist.] 2001, pet. Denied). In *Casteel*, the supreme court concluded error in submitting, over timely and specific objection, a single broad-form liability question that commingled valid and invalid liability grounds, was harmful because the erroneous submission prevented the appellant from isolating the error and present its case on appeal. *Casteel*, 22 S.W.3d at 388. In *Redding*, this court extended the *Casteel* rationale to a broad form damages question that commingled valid and invalid measures of damages. *Redding*, 56 S.W.3d at 154-55. Unlike *Casteel* and *Redding*, the present case does not involve a broad-form question. Instead, the jury was instructed to make separate findings regarding Atieh and Sisa; and, as discussed above, the negative finding regarding Atieh rendered submission of the question regarding Sisa harm-less.

Hernandez v. Atieh, 2008 WL 2133193 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Does any defense attorney believe she has just as good a chance of getting a NO for her client when her client is the only party listed in question 1 and all she has to argue is a sole proximate cause instruction than if she has another party in question 1 that she can argue deserves the YES? By permitting this very, very late designation, the trial court cut off all the other procedural opportunities afforded under § 33.004. For instance, not only did the plaintiff lose the opportunity to strike the designated person after adequate time for discovery, the plaintiff lost any opportunity for discovery. Courts do not have discretion to misapply the law. Doesn't such a gross departure from the provisions and safeguards of Section 33.004 constitute an abuse of discretion?

F. Collaboration Between a Plaintiff and Defendant to Join Additional Tortfeasors After Expiration of Limitations is Permitted (Further Mischief?)

Apparently a plaintiff and a defendant can go to great and obvious lengths to revive a cause of action otherwise barred by limitations.

Flack filed suit against Hanke on July 26, 2005, alleging breach of fiduciary duties, negligence, and violation of the Texas Deceptive Trade Practices Act in connection with the sale of his stock in Flack Interiors, Inc. and certain real property. In July 2007, Flack reached a settlement agreement with Hanke which required Hanke to agree to a new trial setting and to designate both Langley & Banack and Cox Smith (jointly Appellees) as responsible third parties (RTPs). In short, through the settlement agreement, Flack and Hanke agreed: (1) to amend the scheduling order because the deadline to add new parties had passed; (2) Hanke would file a designation of RTPs and secure an agreed order granting the designation; (3) Flack would file motion to join the RTPs as defendants and secure an order granting the joinder; and (4) the parties would file a motion to dismiss Hanke and secure an order of dismissal. Moreover, each step was to be completed in accordance with a timeline provided in the settlement documents. Attached to the agreement were the necessary pleadings to effectuate the settlement, signed by the parties, and ready to be filed in keeping with the timetable.

Section 33.004(e) creates the potential to revive otherwise barred claims against a designated RTP. This procedure may result in the plaintiff collaborating with a defendant to join additional tortfeasors. For example, section 33.004(e) allows a plaintiff to sue a defendant with little or no liability, and that defendant may then designate the true tortfeasor as an RTP. *Id*. The plaintiff subsequently may join the true tortfeasor, avoid a limitations defense, and nonsuit the original defendant.

There is no question that Hanke's designation of Appellees as RTPs, and ultimately their joinder by Flack, was clearly part of the settlement agreement between Flack and Hanke.

Hanke designated Appellees as RTPs after Flack's claims against each of the Appellees would have been barred by limitations. After a *defendant* designates an RTP, section 33.004(e) allows the plaintiff to join the RTPs, regardless of limitations.

Based on the signed settlement agreement, at the time of the designation, Hanke was clearly a settling person under section 33.011. Nothing in Chapter 33, however, precludes a party from being both a defendant and a settling person and Appellees have not provided any authority to the contrary.

As such, because Flack had neither filed, nor taken, a nonsuit against Hanke, Hanke was both a settling person and a defendant under section 33.011. Hanke was, therefore, still a defendant at the time Appellees were designated as RTPs and summary judgment cannot be sustained based on limitations.

The statute anticipates that a party may move to strike the designation of an RTP. Generally, the party moving to strike would be the plaintiff seeking to remove an RTP from before the jury when there is no evidence the particular RTP bore any responsibility for the plaintiff's injury.[FN5] In response, the defendant typically would be the party seeking to retain the RTP in the jury charge to diminish his potential liability and perhaps eliminate any joint and several liability. Thus, to retain the RTP, the statute provides the "defendant" must produce sufficient evidence to raise a fact issue regarding the RTP's responsibility to the claimant. Notably absent from section 33.004 is any method for the RTP to object to its own designation. According the statute, only a party may object to the

designation and move to strike the designation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(f), (g), (*l*) (Vernon 2008).

At the time Langley & Banack filed its motion to strike itself as an RTP, it was a defendant in the lawsuit and therefore a party. But Langley & Banack was no longer an RTP and thus, no longer subject to being stricken under section 33.004(*l*). *See* TEX. CIV. PRAC & REM. CODE ANN. § 33.004(*l*) (Vernon 2008). Langley & Banack cannot use its status as a defendant to strike its former designation as an RTP. Such a theory would require Langley & Banack to define itself as both a defendant and an RTP at the same time. This interpretation of the statute conflicts with its plain wording and renders the statue unworkable. *See Cities of Austin, Dallas*, 92 S.W.3d at 442.

As a defendant, Langley & Banack's claim that there is no evidence of its responsibility is not properly asserted by contesting its designation as an RTP, but may be asserted by a no-evidence motion for summary judgment thereby requiring Flack to present some evidence of Langley & Banack's responsibility. *See* TEX R. CIV. P. 166a(i).

Flack v. Hanke, 334 S.W.3d 251 (Tex. App.—San Antonio 2010, pet. filed).

The original opinion was issued on May 27, 2009. A new opinion, the opinion cited above, was issued more than a year later, on October 13, 2010. The language from the opinion quoted above is in both opinions, but the 2010 opinion adds a section designated as Public Policy and states in pertinent part as follows:

Appellees additionally argue that they were designated as RTPs soley to "try and wash out their limitations defense." Although this appears to be true, the statute does not specifically preclude such designations based on the intent of the designor…Appellees further assert their designations as RTPs were unrelated to the purpose of section 33.004 and were nothing more than an attempt to manipulate the process and circumvent statutory limitations. More specifically, Cox Smith points out that Flack's and Hanke's settlement did not resolve litigation, but actually promoted a brand new suit against the lawyers. See *Elbaor v. Smith*, ,845 S.W.2d 240, 250 (Tex. 1992)…However, because Hanke was both a settling party and a defendant in Flack's lawsuit, the designations were proper under Chapter 33. Thus, the trial court had no discretion to deny the designation of Appellees as responsible third parties under the statute.

Three petitions for review were filed in December 2010. Some of the petitioner-lawyers settled and filed a motion to dismiss on April 11, 2011, which was subsequently granted. On April 15, 2011 the Supreme Court ordered briefing on the merits as to the remaining parties.

Based on a couple of cases following Flack v. Hanke, it appears that the public policy arguments have moved to the foreground. In Villarreal v. Wells Fargo Brokerage Services, LLC, 315 S.W.3d 109 (Tex. App.—Houston [1st Dist.] 2010, no pet.), the court of appeals held that otherwise time-barred claims for breach of fiduciary duty were revived when the defendant-trustee designated the broker as a responsible third party. The RTPs made the following public policy argument:

Interpreted logically, the apparent limitations savings clause [of section 33.004(e)] should only operate to revive claims against later joined responsible third parties in cases where the initial lawsuit was timely filed. Any suggestion to the contrary, namely that limitations may be revived as to claims which were barred on the date the lawsuit was first filed, would essentially strip all defendants who are joined as responsible third parties from any limitations defense, regardless of how far back the conduct in question occurred. Taken to its end, this argument would lead to absurd results and potential for collusion that the legislature could not have possibly intended when they drafted section 33.004(e).

The court of appeals while acknowledging that the movants' policy argument has certain common sense appeal, it cannot serve to defeat the plain language of the statute, which permitted joinder [of the RTPs] in this case. Last year, the San Antonio Court of Appeals rejected a similar public policy argument in *Flack v. Hanke*.

The RTPs gave the following illustration to demonstrate the absurd result which follows from this interpretation:

Plaintiff (P) files suit in January 2008 against D1, an individual driving alone, and D2, a moving company, for negligence stemming from a May 1997 three-car automobile accident. P's claims against D1 and D2 are clearly barred by the two-year negligence statute of limitations. D1, the individual, files a motion to designate T, the employee driver of D2's moving company vehicle, as a responsible third party. P then joins T as a defendant pursuant to 33.004(e), even though 10 years have passed since the accident, and any claims against T are clearly time-barred. By the Chapa Plaintiffs' logic, the claims against T should survive pursuant to the savings clause of 33.004(e), even though the initial suit by P was not timely filed. Thus, P would be able to revive a completely dead case and pursue his 10-year-old claims against T. Clearly this was not the intent of the legislature in drafting 33.004.

The court of appeals found the argument "compelling," but ruled against the RTPs finding the policy argument without merit, deferring to the plain language of the statute as promulgated by the legislature. The court also found

the RTPs' compelling illustration was inapplicable here because the Chapas had a live claim against one of the defendants when they filed suit. Thus, this is not a case which was "completely dead" when filed.

For an example of the completely dead case, we must turn to Ream v. Biomet, Inc., currently pending in the San Antonio Division of the Western District. (Civil No. SA-10-CA-525-OG). There the magistrate judge has issued a report and recommendation to the district judge that Biomet's motion for summary judgment be granted. The district judge has stayed the case pending the outcome of Flack v. Hanke.

The magistrate judge found that the above illustration posed by the RTPs in the Villarreal case was "factually similar to the present case."

The Biomet defendants argue that although "[t]he responsible third party statute allows the jury to allocate responsibility fairly," Ream has manipulated Section 33.004 "to vest the Court with jurisdiction when the case was completely dead." The Biomet defendants contend "Plaintiff knew her claims were time barred[,]…but she intentionally filed suit against a defendant she was willing to dismiss once that defendant designated responsible third parties." Specifically, Ream sued NBSC, "an entity protected by the statute of limitations," and then released NBSC from the suit for $150.00 after it designated as responsible third parties the Biomet defendants, "entities likewise protected" by limitations and from whom Ream is now seeking to recover $10,000,000. The Biomet defendants argue, in sum, that the statute should not "be read to create absurd results as the one Plaintiff attempts here" or to "attribute to the Legislature an intention to work an injustice."

G. But Limitations Cannot be Extended in a Medical Malpractice Case

Chapter 74's "notwithstanding any other law" provision strikes again. This time the provision destroys Chapter 33's balance between the defendant's right to designate a non-party and the plaintiff's right to amend to join that designated non-party and, in some cases, if necessary, revive a claim that would otherwise be barred by limitations.

In this case we consider a statutory conflict regarding whether limitations bars Jeremy Molinet's health care liability claims against two doctors he sued after they had been designated as responsible third parties pursuant to…section 33.004…Molinet joined the doctors as defendants within sixty days after they were designated as responsible third parties but more than two years after they last treated him….However, section 74.251(a) provides a two-year limitations period for health care liability claims that applies "[n]otwithstanding any other law," and section 74.002(a) provides that chapter 74 controls in the event its provisions conflict with any other law…We hold that section 74.251(a) prevails and Molinet's claims against the doctors are barred by its two-year limitations period.

In this case, there was excellent legislative history favoring Molinet's position. That history was quoted by the dissent:

Senator Hinojosa: When a defendant names a responsible third party, as I understand it, the plaintiff has 60 days to bring the third party into the suit, even if limitations would otherwise have run against that person…Is that true in a medical malpractice claim too, because on page 63 of the bill it seems to say that the two-year statute in those cases applies notwithstanding any other law?

Senator Ratliff: Yes, if health care providers are going to have the benefit of the designation of responsible third parties, then they have to abide by the same rules as everyone else. This 60-day provision would apply in health care liability claims.

78th Leg., R.S., Journal of the Texas Senate 5005 (citations omitted). That exchange, which addresses the precise issue before the Court, was "ordered reduced to writing and printed in the Senate Journal" by unanimous consent "to establish legislative intent regarding HB4."

But if the statute's language is clear and unambiguous, a point of dispute between the majority and the dissent, then courts do not look to legislative history, no matter how enlightening. The dissent contended that the simultaneous adoption of both section 33.004(e) and section 74.251(a) "at a minimum, clouds the purportedly unambiguous, '[n]otwithstanding any other law' language of section 74.251(a) the Court relies on." The majority disagreed:

In support of their arguments that section 33.004(e) controls over section 74.251(a), Molinet and the dissent urge us to consider and give overriding weight to statements made by a senator during floor debates and published by unanimous consent in the Senate Journal. We decline to do so. Statements made during the legislative process by individual legislators or even a unanimous legislative chamber are not evidence of the collective intent of the majorities of both legislative chambers that enacted the statute…Moreover, the Legislature expresses its intent by the words it enacts and declares to be the law…When a statute's language is clear and unambiguous it is inappropriate to resort to rules of construction or extrinsic aids to construe the language.

Given that Ch. 74 trumps Ch. 33, what could Molinet have done to protect himself? The Supreme Court offers some suggestions. Question: how practical or efficient are these suggestions?

Molinet could have avoided the limitations difficulty in which he finds himself by taking action such as seeking a scheduling order requiring responsible third parties to be designated in time to allow their joinder as parties before limitations expired. If that failed, he could have added the doctors as defendants within the limitations period, just as he timely named several other healthcare providers as defendants. He did not do so, however, and it is not absurd or nonsensical for him to bear the consequences of his decisions.

The majority does acknowledge that its interpretation creates an imbalance in the scheme described in Chapter 33, but states that the imbalance is created by the Legislature, not the Courts, and it is the Legislature, not the Courts, that should fix the problem.

We are mindful of concerns expressed by the dissent and Molinet that not permitting a plaintiff to join designated responsible third parties outside the limitations period may create an imbalance in the proportionate responsibility framework. But to the extent it does so, that balancing-or-imbalancing- has been accomplished by the Legislature. The statute of limitations in health care liability claims "reflect[s] a considered legislative judgment in favor of the prompt resolution of such claims."…Imbalances the statutes allegedly create are matters to be addressed by the Legislature.

Molinet v. Kimbrell, ---S.W.3d---, 2011 WL 182230 (Tex. 2011), 54 Tex. Sup. Ct. J. 491.

H. Although § 33.004(e) Revives Claims Otherwise "Barred by Limitations," it Does Not Revive Claims Extinguished by a Statute of Repose

Section 33.004(e) of the Civil Practice and Remedies Code purports to revive claims otherwise "barred by limitations" under certain limited circumstances. The issue in this summary judgment appeal is whether this statute applies to revive a claim otherwise barred by a statute of repose, as distinguished from a statute of limitations. The court of appeals concluded that the statute was capable of reviving claims barred by either statutes of limitations or statutes of repose. 243 S.W.3d 138, 141. We conclude that the Legislature did not intend for this statute to revive claims extinguished by a statute of repose. Accordingly, we reverse the court of appeals' judgment and render judgment dismissing the plaintiffs' claim in this case.

The underlying litigation concerns the design and construction of a house.

The Pochuchas sued the builder, Bill Cox. In response, the builder answered and filed a motion for leave to designate Galbraith Engineering Consultants, Inc. and Swientek Construction Company as responsible third parties for purposes of proportionate responsibility under chapter 33 of the Civil Practice and Remedies Code.

After the trial court approved Galbraith and Swientek's designation as responsible third parties, the Pochuchas amended their pleadings to join them as defendants. *See* TEX. CIV. PRAC. & REM. CODE § 33.004(e). Galbraith responded by moving for summary judgment under the applicable statute of repose, contesting its joinder because more than ten years had elapsed since the completion of the improvement. *See id.* § 16.008 (barring suits against engineers for their design, plan, or inspection of the construction of an improvement to real property ten years after its substantial completion).

Because the Pochuchas joined Galbraith as a defendant within the sixty-day window provided under section 33.004(e). the court of appeals concluded that the claim had been revived.

Galbraith argues, however, that section 33.004(e) only revives claims "barred by limitations." Because the revival statute does not mention repose, Galbraith contends that it cannot be used to revive a claim extinguished by a statute of repose.

Repose then differs from limitations in that repose not only cuts off rights of action after they accrue, but can cut off rights of action before they accrue. *Holubec*, 111 S.W. 3d at 37. And while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time. *See Trinity River Auth*., 889 S.W.2d at 261. Thus, the purpose of a statute of repose is to provide "absolute protection to certain parties from the burden of indefinite potential liability." *Holubec*, 111 S.W.3d at 37.

The consequence of construing "limitations" broadly here informs our decision. Such a construction would defeat the recognized purpose for statutes of repose, that is, the establishment of a definite end to the potential for liability, unaffected by rules of discovery or accrual.

Because application of the revival statute in this instance effectively renders the period of repose indefinite, a consequence clearly incompatible with the purpose for such statutes, we conclude that the Legislature intended for the term "limitations" in section 33.004(e) to refer only to statutes of limitations.

Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 SW.3d 863 (Tex. 2009).

III. MANDAMUS

A. Is Mandamus Available to Correct Trial Court Error When it Denies Motion for Leave to Designate? Yes, in the case of Enron Litigation

This case relates to the financial demise of Enron Corporation.

Andersen contends that the trial court abused its discretion by denying leave because the third parties are "responsible third parties" under Chapter 33 of the Texas Civil Practice Remedies Code, and, thus, Andersen has the right to have the entire case, including issues of proportionate responsibility and contribution, tried at one time. The Plaintiffs respond that the third parties are not "responsible third parties" under Chapter 33, but even if they are, the trial court had complete discretion to deny joinder.

In sum, because we conclude that the decision to deny leave to join third parties amounted to a clear and prejudicial error of law, the trial court abused its discretion.

Having found an abuse of discretion, we consider whether Andersen has an adequate remedy at law. Andersen asserts it does not because it may be foreclosed in the future from obtaining contribution from third parties. Because this issue is not settled, Andersen must gamble on how a court considering a later contribution action might rule on the issue. Therefore, we cannot state with certainty that Andersen will have an adequate remedy in a separate suit against the third parties.

Even if Andersen could prosecute a separate suit against the third parties, it is the opportunity to have *one* jury apportion liability among all responsible third parties that Andersen seeks.

Relator has a substantial right to present the complete set of intertwined facts and issues germane to his claims, to *one* factfinder, in *one* proceeding, rather than in two separate suits that are all but foreordained to generate, collectively, a decision destined to fail in the appellate process. The denial of that right would introduce the "empty chair defense," and thereby skew the progress and entire conduct of the proceedings-with the resultant potential to affect the outcome of the litigation profoundly, and to compromise the presentation of the parties' respective claims or defenses in ways unlikely to be apparent in the appellate record.

Similarly, due to the third parties' alleged role in the Enron collapse, their absence would likely profoundly affect the conduct and outcome of this suit in ways unlikely to be apparent in the appellate record. Moreover, due to the enormity of the facts surrounding the collapse, any separate action against the third parties, or even a successful appeal in this suit, would result in an enormous waste of resources. The additional expense and effort of preparing for and participating in two separate trials does not, standing alone, justify mandamus relief. *See id*. at 822 n. 9 (citing *Walker v. Packer*, 827 S.W.2d at 842). However, when a trial court's error will cause a waste of judicial resources, we may properly consider that factor in determining the adequacy of an appeal. *See id*. Therefore, the potential waste of resources, when combined with the possibility that Andersen may not be able to prosecute a separate suit against the third parties, or successfully appeal in this suit, supports our conclusion that Andersen has no adequate remedy at law.

In Arthur Andersen, 121 S.W.3d 471 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding).

B. Courts of Appeals Limit Mandamus Availability to the "Enormous Waste of Resources" Enron Case and, in Full Retreat From *In Re Andersen*, now Routinely Deny Mandamus Relief

In their sole issue, relators contend that the trial court clearly abused its discretion in denying their first, second, and third motions for leave to designate responsible third parties in the underlying lawsuit.

Relators further argue that, because the trial court's rulings "deprive them of their right to have the entire case, including the issues of proportionate responsibility, submitted at one time," they have no adequate remedy by appeal.

Relators argue that they do not have an adequate remedy by appeal because (1) they may lose substantive rights to seek post-judgment contribution from potential joint tortfeasors, (2) they will lose their substantial right to have one jury apportion liability among all responsible parties, (3) this Court's intervention would give needed and helpful direction on the right to designate responsible third parities, and (4) it would be unfair to require the parties and the trial court to expend costs and resources in a highly complex trial that would be subject to reversal on appeal.

In re Arthur Andersen is substantively distinguishable from the instant case because here, we are not dealing with the complex, intertwined facts surrounding the collapse of a major corporation, but a relatively straightforward personal injury case. In this case, the trial court's error can be corrected, if necessary, through a "normal appeal," which would not result in an "enormous waste of resources" similar to that in *in re Arthur Andersen*.

We recognize that if relators eventually have to appeal the trial court's ultimate judgment, conducting a second trial may result in a waste of judicial resources, compounded by the fact that the only available remedy will likely be to order a new trial, *as to all parties and all issues*, so that the jury may apportion responsibility among all persons who should have been designated under the rules. However, we also have to recognize that, in spite of any error

committed by the trial court, it is entirely possible that relators, and not the plaintiffs and intervenors, may ultimately prevail at trial. Moreover, it is entirely possible that other errors presented on appeal may necessitate the order of a new trial. Thus, while we may consider the additional expense and effort of preparing for and participating in another subsequent trial, this factor does not, standing alone, justify mandamus relief if there is an adequate remedy by appeal. *In re Prudential*, 148 S.W.3d at 139.

As instructed by the supreme court in *In re Prudential*, we are mindful that mandamus relief should be used selectively and that the benefits of mandamus review are easily lost by overuse. *Id*. at 138. Although the trial court's order denying relators' their right to designate responsible third parities is not a mere "incidental" ruling, the instant case, a relatively straightforward personal injury action, is not "exceptional."

In re Unitec Elevator Servs. Co., 178 S.W.3d 53 (Tex. App.—Houston [14th Dist.] 2005, orig proceeding).

Through this original proceeding, relator challenges the trial court's order of May 2, 2007 denying relator's motion for leave to join responsible third parties.

The Court is of the opinion that relator has not shown himself entitled to the relief sought. *See In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 64-66 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding); *In re Martin*, 147 S.W.3d 453, 458-59 (Tex. App.—Beaumont 2004, orig. proceeding); *In re Arthur Andersen LLP*, 121 S.W.3d 471, 485-86 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Accordingly, the motion for emergency stay and petition for writ of mandamus are DENIED.

In re Helm, 2007 WL 1584177 (Tex. App.—Corpus Christi 2007, orig. proceeding).

Wilkerson also sought leave to designate Memorial Hermann Hospital, one of Gaddis's health care providers, as a responsible third party. *See* Tex. Civ. Prac. & Rem. Code Ann. § 33.004 (Vernon Supp. 2007). The trial court denied relator's request for leave, ruling that she failed to plead sufficient facts concerning the hospital's responsibility. *See id.* § 33.004(g). Relator now assails that ruling, and the denial of her severance request, by petitioning for a writ of mandamus.

We need not decide whether Wilkerson was entitled to designate the hospital as a responsible third party, because we hold that relator has an adequate remedy by appeal.

This case does not present the sort of extraordinary circumstances that justify mandamus relief. *See In re Arthur Andersen, L.L.P.*, 121 S.W.3d 471, 486 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Instead, allowing mandamus relief in cases like this one would increase the expense and delay of civil litigation by enabling parties to pursue extraordinary relief in all kinds of cases, exceptional or not. *See In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 65-66 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). Therefore, any benefits to mandamus relief are outweighed by the detriments. *See Prudential*, 148 S.W.3d at 137.

In re Wilkerson, 2008 WL 2777418 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

Through this original proceeding, relator challenges the trial court's order of August 26, 2008, denying relator's motion for leave to join third-party defendants and to designate responsible third parties.

The Court, having examined and fully considered the petition for writ of mandamus and response thereto, is of the opinion that relator has not shown itself to the relief sought. Accordingly, the petition for writ of mandamus is DENIED.

In re Scoggins Const. Co., Inc., 2008 WL 4595202 (Tex. App.—Corpus Christi 2008, orig. proceeding).

In the petition, relators ask this court to compel the Honorable Kathleen Stone, presiding judge of the Probate Court No. 1 of Harris County to grant leave to designate a responsible third party under section 33.04 of the Texas Civil Practice and Remedies Code.

Relators requested leave to shorten the time to designate a responsible third party because they filed their motion within 60 days of trial. On December 30, 2008, the trial court denied relators' motion. Relator complains of that denial by filing this petition for writ of mandamus.

In asserting they have no adequate remedy at law, relators rely on this court's opinion in *In re Arthur Andersen*, 121 S.W.3d 471, 483-84 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). In *Andersen*, after the collapse of Enron, investors brought claims against Andersen, Enron's accounting firm, for fraud and misrepresentation. *Id*. at 474. Andersen sought joinder (FN1) of multiple financial institutions as responsible third parties, alleging that these institutions were responsible for the plaintiffs' injuries. *Id*. at 474. The trial court denied Andersen's motion, and Andersen sought mandamus relief. *Id*. This court found that the trial court abused its discretion and that Andersen had no adequate remedy at law. *Id*. at 485-86. Based on this enormous waste of resources, combined with

the possibility that Andersen might not be able to prosecute a separate suit or a successful appeal, the court found that there was no adequate remedy at law. *Id*.

FN1. Andersen sought joinder under a prior version of section 33.04, not applicable to this case, which required joinder rather than designation.

However, this case does not present the sort of extraordinary circumstances that justify mandamus relief. *See In re Unitec Elevator Serv. Co.*, 178 S.W.3d 53, 63-64 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). Whether an appellate remedy is adequate depends heavily upon the circumstances presented. *See In re Prudential Ins. Co.*, 148 S.W.3d 124, 137 (Tex. 2004) (orig. proceeding). In this case, unlike *Andersen*, the facts are relatively straightforward and the trial court's error, if any, can be corrected through the regular appellate process. The additional expense and effort of preparing for and participating in two separate trials does not, standing alone, justify mandamus relief. *Andersen*, 121 S.W.3d at 486. This court has previously determined that permitting mandamus relief in cases such as this one would increase the expense and delay of civil litigation by enabling parties to pursue extraordinary relief in all cases, whether exceptional or not. *In re Wilkerson*, 14-08-00376-CV, 2008 WL 2777418 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding) (memo op.).

In re Investment Capital Corp., 2009 WL 310899 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

On December 11, 2009, relators filed a petition for writ of mandamus, complaining of the trial court's granting of the motion to strike the designation of a responsible third party. The court has considered relators' petition for writ of mandamus and is of the opinion that relators are not entitled to the relief sought because they have an adequate remedy by appeal. *See In re Scoggins Const. Co.*, No. 13-08-00317-CV, 2008 WL 2721181 (Tex. App.—Corpus Christi June 30, 208, orig. proceeding [mand. denied]) (mem. Op.); *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 64-65 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). Accordingly, the petition for writ of mandamus is DENIED. *See* Tex. R. App. P. 52.8(a).

In re Caterpillar, Inc., 2009 WL 5062324 (Tex. App.—San Antonio 2009, orig. proceeding).

C. Mandamus Breakthrough in the El Paso Court of Appeals

The real party in interest, Rafael Martinez, filed suit against Relators alleging he was injured on the premises while making a delivery in the course and scope of his employment with Aeroground. Relators filed a motion for leave to designate Randy Pollet, M.D. as a responsible third party under Section 33.004 of the Civil Practice and Remedies Code, alleging that Dr. Pollet's negligence in treating Martinez's injuries caused Martinez's damages.

The trial court granted the motion and designated Dr. Pollet as a responsible third party. Within 60 days, Martinez amended his petition to include a negligence claim against Dr. Pollet. Martinez did not file an expert report and Dr. Pollet moved to dismiss the claim. Martinez did file a motion to strike the designation of Dr. Pollet on the ground that Relators had not produced sufficient evidence to raise a genuine issue of fact regarding Pollet's responsibility for Martinez's injuries. The trial court granted Martinez's motion to strike the designation of Dr. Pollet. Relators filed a mandamus petition to challenge the trial court's order striking the designation. The El Paso court of appeals first found that the plain language of 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….that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage.

Relators had provided an expert report of their own critical of Dr. Pollet. The court of appeals concluded that Relators had provided sufficient evidence to raise a fact issue regarding Dr. Pollet's responsibility.

The trial court clearly abused its discretion by striking the designation of Dr. Pollet as a responsible third party. The only remaining issue is whether Relators have an adequate remedy by appeal…Relators have a statutory right to demand that the trier of fact determine Dr. Pollet's percentage of responsibility for Martinez's injuries or damages. Mandamus review would preserve this valuable right…The denial of Relators' right to designate Dr. Pollet as a responsible third party would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of Relators' defense in ways unlikely to be apparent in the appellate record. *See In re Arthur Anderson, L.L.P.*, 121 S.W.3d 471, 486 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Thus, it is possible Relators would be unable to obtain relief on direct appeal from the trial court's clearly erroneous ruling.

In re Brokers Logistics, Ltd., 320 S.W.3d 402 (Tex. App.—El Paso 2010, orig. proceeding).

The court of appeals also noted that mandamus relief would spare the litigants and the public the time and money wasted enduring an eventual reversal (assuming one could present the type of record necessary to obtain reversal). The court of appeals specifically recognized that another court of appeals had found appeal to be an adequate remedy in denying mandamus relief, but the El Paso court of appeals found that the potential inability to correct the error on direct appeal weighed in favor of granting mandamus relief.

IV. FEDERAL COURT

A. § 33.004 Does Not Conflict With Rule 14

The issue squarely before the Court is whether a known entity may be designated as a "responsible third party" pursuant to § 33.004 of the Texas Civil Practice and Remedies Coded in a federal diversity case. Cortez argues that Trinidad should not be designated as a responsible third party because § 33.004 conflicts with Federal Rule of Civil Procedure 14.

Several district courts have interpreted this statutory language and concluded that the designation of a responsible third party under § 33.004 does not conflict with Federal Rule of Civil Procedure 14. *Werner v. KPMG LLP*, 415 F.Supp.2d 688, 703 (S.D. Tex. 2006); *Bueno v. Cott Beverages, Inc.*, No. Civ. A. SA04-CA24XR, 2005 WL 647026, *2 (W.D. Tex. Feb. 8, 2005); *see Alvarez v. Toyota Motor Corp.*, No. 3:06-CV-0340-D, 2006 WL 1522999 (N.D. Tex. May 8, 2006). This Court, after examining the relevant statutory language, finds the reasoning presented in these cases to be persuasive. [FN1] Under Rule 14, parties may be formally joined, thereby becoming named parties subject to liability. Under § 33.004, however, responsible third parties are not formally joined.

Cortez v. Frank's Casing Crew & Rental Tools, 2007 WL 419371 (S.D. Tex. 2007).

Muniz's contention that Rule 14, not § 33.004 governs the instant dispute is misplaced. Various sister district courts have interpreted § 33.004's language and concluded the designation of a responsible third party under § 33.004 does not conflict with Rule 14. *Cortez v. Frank's Casing Crew & Rental Tools*, No. V-05-125, 2007 U.S. Dist. LEXIS 7986 at *6 (S.D. Tex. Feb. 2, 2007) (citing compilation of cases). The Court finds these opinions persuasive. As these courts have done, this Court finds that no conflict exists because under Rule 14 parties may be formally joined and become parties to the suit subject to liability, but under § 33.004 responsible third parties are not formally joined--they are merely designated. *Id.*; *Werner v. KPMG*, 415 F.Supp.2d 688, 692 (2006).

However, "[i]f being designated as a responsible third party threatens other interests, such as the responsible third party's reputation, [H & P] may wish to consider intervening in the lawsuit as a full fledged party …."

Muniz v. T.K. Stanley, Inc., 2007 WL 1100466 (S.D. Tex. 2007).

Defendant proposes a First Amended Original Answer, adds affirmative defenses and seeks to designate responsible third parties under Texas Civil Practice and Remedies Code § 33.004.

Plaintiff cites to Federal Rule of Civil Procedure 14, among many others, that "totally occupy the field" of "participants to litigation." Plaintiff, however, confounds conflict with comprehensiveness. If the former is absent, the latter does not preclude the application of a state rule. In fact, several federal courts in Texas, including this Court, have explicitly recognized that § 33.004 does not conflict with Rule 14.

Kelly v. Pacific Cycle, Inc., 2007 WL 4226922 (N.D. Tex. 2007).

Before the Court is Defendants' Joint Motion for Leave to Designate Responsible Third Party. Dkt. No. 22. Plaintiffs have filed an Objection (Dkt. No. 23) to which Defendants have replied (Dkt. No. 24). Having considered the motion, response, and relevant law, the Court believes the motion should be GRANTED.

Plaintiffs' objection attacks Defendants' motion on *Erie* grounds. They argue that because section 33.004 is a procedural provision, the *federal* rules for third party practice apply, and since the federal rules contain no provision for designating a responsible third party, Defendants' motion should be denied.

Plaintiffs' argument, however, is foreclosed by this Court's precedent. Motions based on section 33.004 have been granted numerous times in the past. *See, e.g., Cortez v. Frank's Casing Crew & Rental Tools*, Civ. No. V-05-125, 2007 WL 419371 (S.D. Tex. Feb. 2, 2007). In *Cortez*, "[t]he issue squarely before the Court [was] whether a known entity may be designated as a 'responsible third party' pursuant to § 33.004 of the Texas Civil Practice and Remedies Code in a federal diversity case." Id. at * 1. The Court decided that question in the affirmative, holding that section 33.004 does not conflict with Federal Rule of Civil Procedure 14. *Id*. at *3. Plaintiffs have provided the Court no compelling reasons to stray from that course here.

Gonzales v. RSC Equipment Rental, Inc., 2008 WL 4647060 (S.D. Tex. 2008).

The Texas proportionate responsibility statutes reflect a substantive state policy, and they do not conflict with Fed. R. Civ. P. 14, the closest federal procedural counterpart.

Section 33 provides for the liberal designation of responsible third parties. *Flack v. Hanke*, No. 04-08-00177-CV, --- S.W.3d ---, 2009 WL 1464144, at * 3 (Tex. App.—San Antonio 2009).

Harris Const. Co., Ltd. v. GGP-Bridgeland, 2009 WL 2486030 (S.D. Tex. 2009).

B. Nor is There a Conflict With Rule 14 When the Plaintiff Moves to Join the R.T.P. as a Party

This court granted Haynes's motion to designate Memorial Hermann as a responsible third party on October 27, 2009. Guzman moved under Texas Civil Practice and Remedies Code § 33.004(e) to join Memorial Hermann as a party on October 29, 2009. Haynes opposed the motion, arguing that in the federal cases applying § 33.004, the courts have held that there is no conflict between Rule 14 of the Federal Rules of Civil Procedure and § 33.004 because the responsible third parties were merely designated and not joined. (citing *Muniz v. T.K. Stanley, Inc.*, No. L-06-cv-126, 2007 WL 1100466, at *2-3 (S.D. Tex. Apr. 11, 2007). Haynes argued that because Guzman is now seeking to join Memorial Hermann as a defendant, Federal Rule 14 conflicts with the state statute.

District courts in this circuit have permitted joinder of a responsible third party following designation. These courts recognized that under the Texas responsible-third-party statute, the plaintiff could join the designated third party, even in federal court.

In addition, Rule 14 by its terms does not appear to apply here. Rule 14 deals with when a defending party may bring in a third party. Forbidding Guzman to join Memorial Hermann following its designation as a responsible third party would lead to the untenable result of applying only part of Texas's statutory responsible third-party scheme.

Guzman v. Memorial Hermann Hosp. System, 2009 WL 3837042 (S.D. Tex. 2009).

C. Designating Unknown Persons by Answer, Not by Motion; Concurs With State Court

Defendants' filed their motion on October 15, 2006, seeking leave to designate certain named and unknown third parties as "responsible third parties" pursuant to § 33.004 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (West 2006).

However, the Court reads § 33.004(j) as providing a distinct procedure for designating unknown responsible third parties. According to that subsection, the designating party must--as a prerequisite--allege that the unknown third parties are criminally responsible in a separate answer filed within sixty days of the original answer. Great Dane answered on October 7, 2005 (Dkt. No. 11); Salem answered on June 14, 2006 (Dkt. No. 32). Neither party appears to have filed the separate answer required by § 33.004(j) within sixty days of their respective answers. In fact, neither party filed a separate answer at all that attempted to comply with 33.004(j).

It is not enough, therefore, for the movants here to merely comply with the requirements of § 33.004(a) in order to designate the unknown third parties. The procedure set forth in § 33.004(a) is applicable by its terms only to named third parties. The sole avenue for designating unknown third parties is set forth in § 33.004(j). The only appellate court in Texas that appears to have considered this issue reached the same conclusion. See *In Re Unitec Elevator Services Co.*, 178 S.W.3d 53, 61 (Tex. App.—Houston [1st Dist.] 2005) (orig. proceeding) ("We find that the statute clearly and unambiguously requires a defendant seeking to designate an unknown person as a responsible third party … to file an answer containing such allegations no later than sixty days from filing its original answer.").

Estate of Figueroa v. Williams, 2007 WL 2127168 (S.D. Tex. 2007).

D. Once Leave to Designate Has Been Granted, That R.T.P. is Available for Apportionment of Fault by *ANY* Defendant

Plaintiff opposes Defendant's Motion, arguing that Rule 14 of the Federal Rules of Civil Procedure is in conflict with § 33.004 and therefore, the Texas procedural rule does not apply. Each of the cases cited by Plaintiff in support of this argument, however, was decided based on the prior version of § 33.004. Courts in this federal district have concluded that the current version of § 33.004, which provides for identifying a potentially responsible third party without imposing liability on that party, does not conflict with the joinder provisions of Rule 14.

While summary judgment motions were pending before the Court, Coachmen settled its dispute with ASC. Several weeks later, and nearly six months after the motions deadline set in this case, Willis--without requesting leave to amend the Court's scheduling order, nor demonstrating good cause to do so, as required by Federal Rule of Civil Procedure 16(b)(4)--filed a Motion to Designate Responsible Third Parties [Doc. # 153]. Willis sought to name Stewart Smith, Watson, and Gulf Insurance Company, a Coachmen insurer, as responsible third parties for purposes of Coachmen's negligence claim against Willis. The Court denied the motion as untimely filed. However, during a hearing on the motion, Willis argued that because Stewart Smith and Watson were already designated as responsible third parties by ASC, both parties remain as designated parties regardless of any additional request by Willis.

In this case, it is significant that the drafters of § 33.004 used the phrase "the defendant" in subsection (g), referring back to the movant in subsection (a), but used the term "a defendant" in subsection (l). The Court deems that distinction determinative. The use of different articles in subsections (g) and (l) strongly suggests that any defendant may seek to apportion responsibility for "harms" for which the responsible third parties were initially designated. Accordingly, once leave has been granted to designate a responsible third party, that designated party is available for apportionment of fault by any defendant, provided that--after discovery and prior to submission of the

case to a factfinder, and upon a motion strike the designation due to lack of evidence--some defendant points the court to evidence sufficient to raise a genuine issue of fact regarding the designated party's potential liability for the plaintiff's harm, as that "harm" was initially defined and supported by the moving defendant. *See* Tex. Civ. Prac. & Rem. Code § 33.003(b).

It gives the Court pause to permit a defendant to selectively adopt certain procedural and strategic moves made by a co-defendant--especially where the codefendants' interests are not aligned--without bearing the responsibility or burden of making a proper motion himself. However, in the absence of any authority elucidating the intent of the drafters of § 33.004(l), the Court is bound to apply the traditional canons of statutory interpretation to its construction of this statute. Accordingly, provided sufficient evidence exists to support their inclusion, and because the harm in this case for which claimant Coachmen seeks damages is identical with respect to both ASC and Willis, the Court concludes that the parties designated by ASC as responsible third parties remain available to Willis for apportionment of responsibility for the harms arising from Willis's alleged negligence.

Coachmen Industries, Inc. v. Alternative Service Concepts L.L.C., 2008 WL 2787310 (S.D. Tex. 2008).

E. Pleading Sufficient Facts Under § 33.004 is not Difficult

A state rule, however, should be applied as the rule of decision if it reflects state substantive policy that is not in conflict with the plain meaning of a federal rule. *Exxon Corp. v. Burglin*, 42 F.3d 948, 949 (5th Cir. 1995). Several federal district courts in Texas, including this Court, have applied Texas Civil Practice and Remedies Code section 33.004 in diversity cases, finding no conflict with the Federal Rules of Civil Procedure. *See Kelly v. Pacific Cycle, Inc.*, No. 3:07-CV-607-B, 2007 WL 4226922 at *1 (N.D. Tex. Nov. 29, 2007).

Thus, if a person is designated by the Court as a responsible third party, the person is to be included in the list of parties the jury may consider for allocation of responsibility for plaintiff's damages. Hence, designation of a responsible third party could affect the amount of a plaintiff's recovery.

Before designating a responsible third party, a defendant must request leave of court. *See* Tex. Civ. Prac. & Rem. Code § 33.004; *Nels Cary, Inc.*, 2008 WL 631242 at *1. Texas law provides that leave shall be granted unless a defendant did not plead sufficient facts concerning the alleged responsibility of the third party to satisfy certain pleading requirements after having been granted leave to replead. *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53, 59 (Tex. App.—Houston [1st Dist.], no pet.). In determining whether a defendant has pled sufficient facts, federal courts look at allegations in a defendant's answer and/or counterclaim. *Nels Cary, Inc.*, 2008 WL 631242 at *2 (stating that leave would be granted if defendant's answer and counterclaim sufficiently allege that the third party caused or contributed to causing in anyway the harm for which recovery of damages was sought). Courts have also found sufficient pleading where a defendant points to allegations in a plaintiff's pleading that demonstrate responsibility of a third party. *See State of Dumas v. Walgreens Co.*, 3:05-CV-2290, 2006 WL 3635426 at *2 (N.E. Tex. Dec. 6, 2006) (court concluded plaintiffs failed to show defendants did not plead sufficient facts where defendants' motion cited allegations plaintiffs made in their pleadings about the third party to be designated).

The Court finds that Plaintiffs have not shown that Defendant Clark has failed to plead sufficient facts under § 33.004. Accordingly, the Court finds that Defendant Clark's motion for leave to designate third parties should be and is hereby GRANTED.

Eisenstadt v. Telephone Electronics Corp., 2008 WL 4452999 (N.D. Tex. 2008).

F. Leave to Designate the United States (the U.S. Army) Denied; Leave to Designate Al Qaeda Granted; Unknown Insurgents Must be Designated in a Timely Answer

This case arises out of an attack by Iraqi insurgents on civilian contractors driving fuel convoys in Iraq. Defendants seek leave to designate responsible third parties under the Texas proportionate responsibility scheme contained in Chapter 33 of the Texas Civil Practice and Remedies Code.

Defendants move for leave to designate two responsible third parties: the United States, and "insurgent forces." Plaintiffs object to their designation. Therefore, the burden is on the plaintiffs to demonstrate that the defendants have not pled sufficient "facts concerning the alleged responsibility of the [United States, and "insurgent forces"] to satisfying the pleading requirements of the Texas Rules of Civil Procedure." § 33.004(g).

First, the defendants seek leave to designate the United States by virtue of the actions of the United States Army. They argue that the Army had plenary control of the supply convoys at issue and was entirely responsible for providing adequate force protection for those convoys. They further argue that the Army's conduct was a cause in fact of the plaintiffs' injuries. Plaintiffs counter that the Army does not meet the definition of a responsible third party as defined by Chapter 33 and therefore may not be designated. The court agrees.

Because the Army's conduct is at issue here, the specter of political question again arises.

The political question doctrine is based on the concept that the judicial branch cannot review certain actions undertaken by coordinate branches of government out of respect for those branches. *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (citing *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)).

The court notes that designating the Army as a responsible third party under the Texas proportionate liability statute would not join the Army as a party. *Werner v. KPMG*, 415 F.Supp.2d 688 692 (S.D. Tex. 2006) (Rosenthal, J.). Nor does an assessment of responsibility by the trier of fact attach any liability to a responsible third party and may not be used in any other proceeding. § 33.004(i). However, the political question doctrine does not address a court's ability to impose liability on coordinate branches. Instead, it speaks to a court's ability to identify a duty owed, determine a breach, and mold a protection for the right. *Lane*, 629 F.3d at 557-58 (quoting *Baker*, 369 U.S. at 198). Therefore, the court finds that submitting the Army's actions in Iraq to a judicial proceeding--even with no liability attached--is beyond the authority and competence of the court. Accordingly, leave to designate the United States as a responsible third party under Chapter 33 of the Texas Civil Practice and Remedies Code is DENIED.

Defendants also seek leave to designate "insurgent forces" as responsible third parties. They identify "insurgent forces" as "Al Qaeda, Al Sadr, Muqtada al-Sadr, the Mahdi Army, and the Badr Brigade … and possible other unknown insurgent forces." Although they have been grouped together in the defendants' motion, "insurgent forces" as they define them encompass two separate types of persons--known and unknown. Since the Texas Legislature created two distinct procedures for reviewing these two types of persons, the court will treat them separately.

1. Al Qaeda, Al Sadr, Muqtada al-Sadr, the Mahdi Army, and the Badr Brigade.

The court agrees that the identifiable entities that defendants seek to designate are persons as contemplated in § 33.011(6).

The plaintiffs also argue that even if these groups are legal entities, there is no applicable legal standard that can be applied to them. They base this argument on the fact that the parties are at war, making standards difficult to identify and apply. Additionally, they argue that the code does not expressly allow designation of non-American entities beyond the reach of the courts. However, as explained above, the legislature in 2003 amended the definition of responsible third party to *eliminate* the need for the court to have jurisdiction over the proposed third party. Additionally, the respect for coordinate branches of government which requires the judicial branch to employ restraint when reviewing actions taken by the Army is not present when reviewing the actions of these entities. Therefore, the court believes that applicable legal standards can be formulated for the actions of these entities. The court finds that Al Qaeda, Al Sadr, Muqtada al-Sadr, the Mahdi Army, and the Badr Brigade are persons under § 33.011(6) and may be designated as responsible third parties. Accordingly, the motion is GRANTED with regard to these identified entities. However, the court expresses no opinion regarding the ability of these entities to remain designated through the increasingly difficult hurdles ahead.

2. Possible Other Unknown Insurgent Forces.

The defendants also include the phrase "other unknown insurgent forces" within their definition of "insurgent forces." Section 33.004 sets forth the rule for designating unknown persons as responsible third parties.

The court recognizes that the deadlines indicated in the statute may not be binding on this court because they may not be considered a substantive part of the statute itself. However, the Texas legislature prescribed such an early and specific pleading standard for unknown third parties because it intended to furnish a significant amount of notice to other parties. *See Unitec*, 178 S.W.3d at 61. Therefore, the court finds that the requirement of an early designation of an unknown party accompanied by specific pleading requirements is a part of the substantive core of the proportionate scheme. *Accord Estate of Figueroa v. Williams*, No. V-05-56, 207 WL 2127168 at *1 (S.D. Tex. July 23, 2007) (Rainey, J.). Accordingly, since defendants' answer is insufficient to meet the pleading standards required by the statue, the designation of "other unknown insurgent forces" is time barred, and the motion is DENIED with respect to them.

Fisher v. Halliburton, 2009 WL 1098457 (S.D. Tex. 2009).

G. But: Designation of United States (U.S. Army) Permitted, Notwithstanding the *Feres Stencel Doctrine*

This case arose following the crash of a Blackhawk helicopter near Kirkuk, Iraq on August 22, 2007, which resulted in the death of fourteen American servicemen. Plaintiffs, family members of those killed, brought suit against Defendant L-3 Communications Vertex Aerospace, LLC ("L-3"), alleging that during a maintenance procedure before the crash, an L-3 employee left a foreign object in the helicopter, which ultimately caused the helicopter to crash.

Plaintiffs initially filed suit on August 7, 2008, bringing a claim for negligence. They filed their most recent amended complaint, their Third Amended Complaint, on November 11, 2009. On November 24, 2009, Defendant filed its Answer. In paragraph 13 of its Answer, Defendant states as follows:

"Vertex designates the United States, the United States Army as responsible nonparties if appropriate to do so under the law that ultimately applies to this matter, and Vertex incorporates its Notice Of Intention To Designate The United States of America And United States Army As Responsible Nonparties by reference, as if set forth herein in full."

Plaintiffs filed their Objection on January 4, 2010.

Based upon the *Feres-Stencel* doctrine, Plaintiffs argue that Defendant's designation of the United States and U.S. Army as responsible nonparties would entitle Defendant to submit questions to the jury concerning the government's potential negligence, and the jury might reduce Defendant's liability to the extent it finds the government liable. Plaintiffs contend that "such a procedure would be analogous to Defendant seeking indemnity from the Army," which is barred under *Stencel*. Plaintiff further argues that the rationale behind *Feres* and *Stencel* supports the conclusion that Plaintiff should not be allowed to designate the United States or U.S. Army as responsible non-parties.

Second, designation and indemnity are not analogous. Under Texas law, for example, the responsible third-party designation does not by itself impose liability and has no preclusive effect on other proceedings. Tex. Civ. Prac. & Rem. Code. § 33.004(i); *Muniz v. T.K. Stanley, Inc.*, 2007 WL 1100466, at *3 (S.D. Tex. Apr. 11, 2007). In fact, entities that are not subject to any legal liability may be designated as responsible third parties. § 33.011(6). As one court has explained "[i]n Texas tort law, the 'responsible third party' is anything but. He is not really a 'party,' and he is not really 'responsible.' He has but one reason to exist: that is, to allow a liable defendant to avoid joint and several liability." *Cortez v. Frank's Casing Crew & Rental Tools*, 2007 WL 419371, at *2-3 (S.D. Tex. Feb. 2, 2007) (citing David W. Holman, Responsible Third Parties, 46 S. Tex. L.Rev. 869, 870 (2005)).

In light of these considerations, the Court must overrule Plaintiff's Objection at this time.

McLead v. L-3 Communications Vertex Aerospace, LLC, 2010 WL 143715 (S.D. Tex. 2010).

H. The Interaction Between Chapters 33 and 82 Causes Confusion

From a practical standpoint, the Court notes that Diamond's argument has some appeal. Section 82.003(a)(7) allows for liability to be imposed on an otherwise innocent seller if the plaintiff demonstrates that the responsible manufacturer is beyond the court's jurisdiction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.003(a)(7) (Vernon 2008). The effect of this section would seem to be undermined, if not wholly obviated, if the seller is allowed to shift responsibility back to the out-of-jurisdiction manufacturer by designating the manufacturer as a responsible third party.

In light of the foregoing, and in deference to the broad-application language of chapter 33, the Court grants the motion for leave to designate. This conclusion is supported by the fact that the definition of "responsible third party" under chapter 33 specifically excludes "a seller eligible for indemnity under section 82.002." TEX. CIV. PRAC. & REM. CODE ANN. § 33.011(6) (Vernon 2008). This demonstrates that the Texas legislature is aware of the potential interaction between chapter 33 and 82, yet has not specifically excepted out-of-jurisdiction manufacturers, as defined by section 82.003(a)(7), from the coverage of chapter 33.

In its motion seeking leave to designate, KOF acknowledges that SingFun is a Chinese company. However, neither KOF nor Diamond address the question of whether SingFun would be subject to this Court's jurisdiction in any detail. Thus, the question of whether SingFun is indeed beyond the Court's jurisdiction and the effect jurisdiction over SingFun might have on the chapter 33 and 82.003(a)(7) analysis remains open.

Diamond H. Recognition LP v. King of Fans, Inc., 589 F.Supp.2d 772 (N.D. Tex. 2008).

Plaintiffs are opposed to the designation of Shanghai Jiangnan as a responsible third party. Plaintiffs do not contend that Vanguard has not plead sufficient facts. Rather, Dhaliwal contends that because this court found Sahghai Jiangnan is not subject to the court's jurisdiction and, therefore, Vanguard could be held liable as a non-manufacturing seller, Vanguard should be precluded from designating Shanghai Jiangnan as a responsible third party. For support, Dhaliwal points the court to the case of *Diamond H. Recognition LP v. King of Fans, Inc.*, 589 F. Supp.2d 772 (N.D. Tex, 2008). The opinion by Judge Means appears to leave open the possibility that if the foreign manufacturer in the case were not subject to the court's jurisdiction, then the foreign manufacturer may not be a proper responsible third party. *Id*. at 777 ("The Court notes this is not the final word in regard to the designation of SingFun as a responsible third party…. [The] question of whether SingFun is indeed beyond the Court's jurisdiction and the effect jurisdiction over SingFun might have on the chapter 33 and [exception to seller immunity] analysis remains open.").

This case does not hold that a defendant beyond the court's jurisdiction cannot be designated as a responsible third party. The Texas Legislature amended § 33.011 of the Texas Civil Practice and Remedies Code in 2003, specifically removing language that requires the responsible third party to be subject to the court's jurisdiction. *See*

David W. Holman. *Responsible Third Parties*, 46 S. Tex. L.Rev. 869, 883-4 (2004-05) (quoting *Tort Reform of 2003: Hearings on Tex. H.B. 4 Before the Senate Comm. On State Affairs*, 78th Leg., R.S. (Apr. 10, 2003), *reprinted in* 2 LEGLSLATIVE HISTORY OF TEXAS H.S. 4: THE MEDICAL MALPRACTICE & TORT REFORM ACT OF 2003, at 1304 (2003)). The current definition of "responsible third party" is expansive and has even been described as a "veritable free-for-all, with submission of 'bankrupt defendants, foreign defendants, unknown defendants, unidentified defendants, phantom vehicles, subcontractors … whose names can't be remembered,' and so forth." *Id*. at 884. The court, therefore, finds that Shanghai Jiangnan falls within this broad definition as a responsible third party.

Dhaliwal v. Vanguard Pharmaceutical Machinery, Inc., 2010 WL 231755 (S.D. Tex. 2010).