

Settlement Credits, Constitutional Challenge, and The Impact on Tort Claims

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Questions?

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The Agenda

Introduction

Examine the Law Governing Settlement Credits

Constitutional Viability of Chapter 33's Settlement Credit Provisions as Applied to Derivative Tort Claims

Protection of Settlement Credits in Construction Claims



Introduction

Chapter 33 Provisions

Section 33.012 – Recovery by the Claimant/Application of Settlement Credits

Relevant Definitions

Chapter 33 History

Chapter 33 Provisions Governing Settlement Credits

- Chapter 33 applies to:
 - Cause of action based on tort
 - Action brought under DTPA
 - In which the Defendant, a settling person, or a responsible third party is found responsible for a percentage of harm for which relief is sought
- Chapter 33 does NOT apply to:
 - Action to collect workers' compensation benefits, actions against employer for exemplary damages arising out of death of employee
 - Claim for exemplary damages in actions to which chapter otherwise applies

Types of Claims Subject to Chapter 33 Include:

- Breach of Implied Warranty under U.C.C. art. 2 under which party seeks damages for death or personal injury
 - *JCW Elecs., Inc. v. Garza*, 257 S.W.3d 701 (Tex. 2008)
- Claims under Dram Shops Act
 - *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680 (Tex. 2007)
- “Probably” applies to all statutory tort claims
 - *Villarreal v. Wells Fargo Brokerage Servs.*, 315 S.W.3d 109, 124-25 & n.7 (Tex. App.—Houston [1st Dist.] 2010, no pet.)



Chapter 33 Does Not Apply To

- Conversion (Bus. & Comm. Code § 3.420)
 - *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104 (Tex. 2004)
- Statutory Fraud (Bus. & Comm. Code ch. 271)
 - *Davis v. Estridge*, 85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied)
- Uniform Fraudulent Transfer Act
 - *Challenger Gaming Solutions, Inc. v. Earp*, 402 S.W.3d 290, 299 (Tex. App.—Dallas 2013, no pet.)

Texas Civil Practice & Remedies Code, Section 33.012

- Section 33.012(b), Texas Civil Practice and Remedies Code:
 - If the “claimant” has settled with one or more persons, the amount recovered by the claimant with respect to a cause of action should be reduced by an amount equal to the sum of the dollar amounts of all settlements.
- Statute provides additional option for settlement credit in a health care liability claim: “the percentage equal to each settling person’s percentage of responsibility as found by the trier of fact.”
 - Tex. Civ. Prac. & Rem. Code § 33.012(c)

Chapter 33's Settlement Credit Provisions

- “Claimant” is defined:
 - A person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, “claimant” includes:
 - (A) the person who was injured, was harmed, or died or whose property was damaged; and
 - (B) any person who is seeking, has sought, or could seek recovery of damages for injury, harm, or death of that person or for the damage to the property of that person.



The Relevant History

- 1987 Ch. 33
 - Definition of “claimant” amended to include not only a party seeking damages for injury but any other party “who seeks recovery of damages for injury to another person”
 - 33.012 settlement credit provision amended to provide that if “claimant” settles “with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by credit equal to . . . the sum of the dollar amount of all settlements”



The Relevant History

- *Drilex Sys., Inc. v. Flores* (Tex. 1999)
 - “Plain language” of this scheme encompasses “all of the family members” who “are seeking recovery of damages for injury” to their relative
 - Purpose was to protect defendants from plaintiffs who would manipulate settlements among those seeking recovery of damages for injury to another person
 - Flores injured and sues, along with children and wife
 - Settlement with one defendant – payment of sums to each P
 - Supreme Court: Must add all settlement amounts and subtract from all damages awarded and then award to individual Ps based on pro-rata of jury’s verdict applicable to each



The Relevant History

- *Utts v. Short* (Tex. 2002)
 - Medical negligence lawsuit filed by patient's estate and children, alleging wrongful death of patient resulting from health care provided by physician and hospital
 - One daughter settled with hospital, separately distributed sums she received to other family members, and then non-suited her claims against all defendants
 - Other family members later settle with hospital for \$10, claiming that these nominal payments were the only proper settlement credits remaining defendant, Dr. Utts, was entitled to receive
 - Supreme Court plurality opinion: could not agree whether term "claimant" in Section 33.011(1) also included a settling party who was no longer a party to the suit



The Relevant History

- *Utts v. Short*
 - Nonsettling party should not be penalized for events over which it has no control
 - Burden-shifting based on presumption that non-settling D is entitled to settlement credit after it introduces evidence of P's settlement
 - P is in best position to demonstrate why rendering judgment in entire amount of jury's verdict would not amount to a double recovery
 - If P fails to satisfy burden, then D is entitled to credit equal to entire settlement amount



The Relevant History

- Legislature immediately responds to *Utts v. Short*
- HB 4 (2003) amends definition of “claimant”:
 - “any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of” another person
- Amended Section 33.012 to provide for credit in amount equal to percentage of settling person’s responsibility in all but health care liability claims, which had additional option for dollar-for-dollar credit

Constitutional Challenge

Virlar v. Puente: Violation of Open Courts Provision of the Texas Constitution

Impact on Derivative Claims Subject to Chapter 33



Virlar v. Puente

- Medical negligence cause of action brought by patient, Puente, her minor daughter and mother against physicians and hospital
- Puente claimed permanent injury arising out of negligent medical care
- Puente's daughter/mother claimed loss of consortium arising out of Puente's permanent injury
- Hospital settled; Puente, and Puente's daughter and mother dismissed all claims against the hospital



Virlar v. Puente

- Settlement approval hearing: Puente announced monies to be paid to daughter only
- Puente claimed if paid to her, she will have to reimburse others who paid for her care under their subrogation rights and will realize \$-o- for the multi-million dollar settlement
- Daughter takes all monies, dismiss claims against hospital; later, nonsuits claims against all Ds
- Physicians objected to attempt to manipulate settlement credit and they would claim credit for entire settlement regardless who received monies



Virlar v. Puente

- Verdict for Puente
- Physicians seek dollar-for-dollar settlement credit under 33.012(c)
 - Puente and her daughter are “claimant” under express terms of statute
- Puente objects to dollar-for-dollar credit, arguing physicians entitled to settlement credit for amount of benefit Puente received (zero dollars because paid to daughter or at most, some attorney’s fees collected from settlement used to fund litigation)
- Trial Court denies any settlement credit



Virlar v. Puente (4th COA, en banc)

- First concludes that Puente asserted Open Courts violation through application of Chapter 33 to her jury award of purely economic damages
- Holding
 - Definition of “claimant” in Chapter 33 unconstitutionally deprives Puente of her complete recovery
 - Legislature cannot circumvent Open Courts guarantee by statutorily changing definition of “claimant” and thereby restricting common-law medical malpractice cause of action
- Result: Physicians entitled to some settlement credit, so case must be remanded for determination of amount of benefit Puente received from the hospital’s settlement under *Utts v. Short*



Virlar v. Puente (4th COA, *en banc*)

- Court's Reasoning:
 - Agreed Chapter 33's definition of "claimant" included minor daughter who asserted loss of consortium claim arising out of her mother's permanent injury
 - Court relied on *Lucas v. United States*, which challenged only the medical malpractice statute's cap on damages
 - Held that a statute like Chapter 33 could not unreasonably restrict recovery of economic damages



Virlar v. Puente

- Petition for Review filed
 - To violate the Open Courts Provision of the Texas Constitution, a statute must be an arbitrary and unreasonable withdrawal of common-law remedies for well-established common-law causes of action
 - Does the definition of “claimant” cause “the effective abrogation” of a plaintiff’s well-established common-law remedy for full recovery of jury’s verdict?
 - Is the unitary definition arbitrary or unreasonable, where it prevents manipulation of settlement credits, encourages prompt settlements in cases involving derivative claims?
 - Is the definition of “claimant” a proper exercise of the Legislature’s police powers?

Preserving Settlement Credit Rights

Effect of *Virlar v. Puente* on Derivative Claims
Subject to Chapter 33

Pleading

Proof

Effect of *Virlar* on Derivative Claims

Subject to Chapter 33

- *Virlar v. Puente*: health care liability claim, governed by Chapter 74 of the Texas Civil Practice & Remedies Code
- Relied on *Lucas v. United States*, which involved prior version of medical malpractice statute's cap on damages in all claims
- Arguably, *Virlar* only applies to health care liability claims where nonsettling defendants seek settlement credit for settlement paid to derivative plaintiff no longer a party to the case
- Anticipate that Plaintiffs in non-health care liability claims will attempt to assert unconstitutionality of Chapter 33's definition of "claimant" and application of the definition and section 33.012 in cases involving derivative claims



Pleadings

- Pretrial: invoke the provisions of Chapter 33, including settlement credit, definition of “claimant”
- Pretrial: affirmatively and alternatively plead offset/one-satisfaction rule
- Pretrial or post-trial: As soon as possible, object to manipulations of settlement credit through structure of settlements designed to deprive the nonsettling defendant of the full amount of dollar-for-dollar credit
- Request dollar-for-dollar credit
- Post-judgment: request relief through motion to modify



Proof

- Settlement Credit Burdens if Chapter 33 Applies:
 - Nonsettling D requesting settlement credit must prove the amount of the settlement
 - Burden shifts to P to prove any amount paid for claims allocated to claims for which no credit can be had
- Settlement Credit Burdens if Chapter 33 Does Not Apply:
 - Meet burdens required for Chapter 33
 - Be prepared to address *Utts* benefit hearing



The End – Thank You!