

THIRD PARTY PRACTICE

Fifth Annual Construction Symposium
City Place Conference Center
Dallas, TX

January 29, 2010

R. Douglas Rees
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
214/712-9500
214/712-9540 (Fax)

TABLE OF CONTENTS

	<u>PAGE</u>
I. Introduction.....	1
II. Third Party Practice	1
A. Strategic Considerations	1
B. Standard Third Party Claims.....	2
C. The Typical Claim	2
1. Contribution and Indemnity.....	2
2. Other Available Claims	3
3. Plaintiff’s/Owner’s Claims May Dictate Third Party Claims.....	3
III. Responsible Third Parties	4
A. Designating A Responsible Third Party	4
B. Abrogation of Limitations.....	6
C. The Statute of Repose	7
D. When the Plaintiff Is Otherwise Prohibited From Bringing Claim Against the Responsible Third Party.....	8
1. Parties Who Have Been Dismissed Based on a Substantive Ruling.....	9
2. Parties Who Have Been Dismissed Based on a Legal Doctrine	9
IV. Statutory Indemnity For Products Claims.....	10
V. Conclusion	14

TABLE OF AUTHORITIES

CASES

<i>Barham v. Turner Construction Co. of Tx.</i> , 803 S.W.2d 731 (Tex.App.—Dallas 1990, writ denied)	13
<i>Bilek & Purcell v. Paderwerk Gebr.</i> , 694 S.W.2d 225 (Tex.App.—Houston [1st Dist.] 1985, no writ)	2
<i>Cities of Austin, Dallas, Fort Worth and Hereford v. Southwestern Bell Tele., Co.</i> , 92 S.W.3d 434 (Tex. 2002)	6
<i>Ethyl Corp. v. Daniel Constr. Co.</i> , 725 S.W.2d 705 (Tex. 1987)	3
<i>Flack v. Hanke</i> , ___ S.W.3d ___, 2009 Tex. App. LEXIS 3639 (San Antonio May 27, 2009).....	5, 6, 10
<i>Galbraith Engineering Consultants, Inc. v. Pochucha</i> , 290 S.W.3d 863 (Tex. 2009)	7, 8
<i>Galbreith v. Pochucha</i> , 290 S.W.2d at 869	9
<i>Goosecreek Consol. ISD v. Jarrar's Plumbing</i> , 74 S.W.3d 486 (Tex.App.—Texarkana 2002, pet denied)	2, 3
<i>Holubec v. Brandenberger</i> , 111 S.W.3d 32 (Tex. 2003)	8
<i>Keck v. Dryvit Sys.</i> , 830 So.2d 1 (Ala. 2002)	13
<i>Lamar, Inc. v. Mid-Continent Casualty Co.</i> , 242 S.W.3d 1 (Tex. 2007)	13
<i>Paragon v. Larco</i> , 227 S.W.3d 876 (Tex.App.—Dallas 2007, no pet.)	3
<i>Pugh v. General Tiseo Supplies, Inc.</i> , 243 S.W.3d 84 (Tex.App.—Houston [1st Dist.] 2007, no pet.)	13
<i>R.H. Tamlyn & Sons, LP v. Scholl Forest Indus., Inc.</i> , 208 S.W.3d 85 (Tex.App.—Houston [14th Dist.] 2006, no pet.).....	13
<i>Valley Industries, Inc. v. Martin</i> , 733 S.W.2d 720 (Tex.App.—Dallas 1987)	2

Williamson v. Tucker,
615 S.W.2d 881 (Tex.App.—Dallas 1981, writ ref'd n.r.e.)..... 2

STATUTES

78th Leg., Ch. 204, Sec. 4.03, 4.04, 4.10(2), §33.004 5
Rem. Code §33.004(g)..... 4, 5, 12
Rems. Code §16.008(c)..... 8
Texas Rule of Civil Procedure 38 2

THIRD PARTY PRACTICE

I. INTRODUCTION

Construction defect claims, perhaps more than any other type of claim, involve third party practice. Construction of any type of facility involves a number of different parties, both on the design side as well as the construction side. When a problem arises, it is not always clear what the cause of the problem is and ultimately there are often multiple causes of the problem. Upon recognizing a problem, the owner naturally turns to the parties with whom it has a direct, usually contractual, relationship – the architect on the design side and the general contractor on the construction side. Those parties are generally involved in if not heading up the investigation into the cause of the problem or problems.

Typically there are multiple design professionals involved and everyone but the architect is a subconsultant of the architect. The vast majority of work done in the construction industry is typically performed by subcontractors and not the general contractor and so there are several parties involved on the construction side as well. Most of those parties have their contractual relationship with the general contractor and the owner has contracted with the general contractor for all of the work to be performed. Other party's work can also play a role and have an impact on the cause of any construction defect. For instance, there may be a problem with the land on which the facility was constructed bringing the developer into the equation. The developer may have hired other parties, including design consultants and contractors to develop the land. Additionally, construction of course involves the use of construction materials that are provided by manufacturers and those materials may have defects or deficiencies that cause or contribute to a problem with the facility.

The first thing that must be done is to identify the problem or problems. This may be obvious and therefore relatively simple or it may be quite complex. Each party, whether contacted initially by the owner about a problem or by some other party involved in the project,

should perform their own analysis and investigation to make their own determination as to the cause or causes of the problem(s) at issue. The other parties who are identified as likely or possibly causing or contributing to the problem may be downstream or upstream from the party making this assessment or they may be involved in the project but have no relationship with the party making the assessment. Whatever the case may be, if those other parties are identified as a potential contributor to the problem they need to be brought into the litigation.

II. THIRD PARTY PRACTICE

Third party practice is the term used to generally refer to the practice of bringing parties who are not yet involved into the litigation. The types of claims that can be used to bring additional, third parties to the litigation vary depending on the third parties' involvement and their relationship to the party seeking to bring them into the litigation. Texas law also provides a mechanism for identifying and attributing a portion of the responsibility to a third party's work without actually bringing them into the litigation as a party. This relatively new practice has had a significant strategic and substantive impact on construction defect claims and third party practice with respect to such claims. This paper will discuss the various types of third party practice and issues that have been and are being encountered with respect to such claims.

A. Strategic Considerations

Third party practice involves significant strategic considerations that must be analyzed and evaluated prior to engaging in it. The responsible third party statute, discussed in detail below, provides another facet and layer to these strategic considerations. As with all such decisions, the goal is to select the one that will most benefit your case and your client.

The consideration starts with determining whether it is beneficial to bring a party into the suit in the first place, either as a party or a designated responsible third party. It may be that the third party could be of greater strategic benefit or use by not being identified as a third party. They may be a more willing and consequentially more beneficial witness at trial

if they are not a party or designated responsible third party. There are also circumstances in which the potential third party could, if given the opportunity, turn on you and provide or shade testimony that could cause more damage than good. Concerns of this type are often unfounded in a large construction project. Many players in the construction industry, and particularly the more seasoned ones, take no offense to claims being asserted against them when their work is even remotely called into question. For those that are a little more sensitive to such matters, their reaction can often be addressed with a little diplomacy and communication. Nevertheless, these are issues that should be taken into account when engaging in third party practice.

B. Standard Third Party Claims

The simplest and most common way to bring a third party into the action is to assert a third party claim directly against them and bring them into the lawsuit as a party. Texas Rule of Civil Procedure 38 is the rule that governs third party practice. It provides a broad ability for defendants to bring claims against third parties. It speaks in terms of voluntary joinder. The rule specifically provides that a third party claimant does not even need permission from the court to bring in a third party defendant if the claimant files a third party action not less than thirty (30) days after service of his original answer. After thirty (30) days, a party must obtain leave of court to file a third party action but such leave is typically freely given. *Valley Industries, Inc. v. Martin*, 733 S.W.2d 720 (Tex.App.—Dallas 1987); *Williamson v. Tucker*, 615 S.W.2d 881, 886-87 (Tex.App.—Dallas 1981, writ ref'd n.r.e.). While leave of court is generally easy to obtain, the rule does specifically require it if the third party claim is brought more than thirty (30) days after the third party claimant's original answer is filed. Failure to obtain such leave of court makes the third party claim invalid and could result in any relief awarded on the third party claim potentially meaningless. *Bilek & Purcell v. Paderwerk Gebr.*, 694 S.W.2d 225, 227 (Tex.App.—Houston [1st Dist.] 1985, no writ).

Rule 38 specifically provides that a third party claim can be brought “[a]t any time after

commencement of the action.” Practically speaking, scheduling orders issued by courts typically provide a deadline for joinder or the addition of new parties, effectively governing the timing of third party practice. These orders can fairly easily be modified if the circumstances dictate that additional parties need to be brought into the litigation. One circumstance that courts do not take to kindly to, however, is the attempt by a party to bring a third party claim late in the litigation and on the eve of a trial setting. There are circumstances in which this is unavoidable, but it is always the better course of action to get third parties identified prior to coming up on a trial setting.

C. The Typical Claim

1. Contribution and Indemnity

In order to bring a third party claim, the third party must arguably have contributed to or in some way be responsible for the claim at issue (i.e. the plaintiff's claim). Rule 38 requires that a third party defendant be a party who “is or may be liable to [the third party claimant] or to the plaintiff for all or part of the plaintiff's claim against [the third party claimant].” TRCP 38. A fairly broad and easy standard to meet but a standard nonetheless. Additionally, the third party claimant must have a claim to assert against the third party defendant.

By far the most common third party claim is one for contribution, asserting that the negligent acts or omissions of the third party defendant somehow contributed to causing the plaintiff's damages. The theory is based on the third party defendant's duty not to engage in whatever act that it did negligently. This is a duty virtually every party has and a contribution claim is therefore typically available to a third party claimant. Further, such a third party action for contribution is not an independent cause of action but is instead a derivative one. Therefore, the limitations on such a claim do not accrue until the third party claimant is held responsible to the plaintiff (i.e. until judgment). *Goosecreek Consol. ISD v. Jarrar's Plumbing*, 74 S.W.3d 486, 492 (Tex.App.—Texarkana 2002, pet denied). As a result, limitations is never a prohibition to bringing a claim for contribution.

There may be other claims available as well. These are often dependant upon a contractual relationship or some sort of statutory provision. The most basic of these is an indemnification provision. The indemnity that is available at common law has been so limited over the years that for all practical purposes, and particularly in the context of construction litigation, there is no common law indemnity available in the state of Texas. However, many construction contracts have indemnification provisions and parties therefore often have available to them contractual claims for indemnity that can be asserted in a third party fashion, particularly with respect to subcontractors and subconsultants. A contractual claim for indemnity must meet the requirements of the express negligence rule in order to be enforceable. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708-09 (Tex. 1987). The enforceability of such agreements are often far from certain, but a court's interpretation of the enforceability of such an agreement is likewise far from certain. Consequentially, if there is any contractual provision addressing indemnity it is likely to be asserted once the decision to go forward with a third party claim has been made. Like with contribution claims, limitations do not begin to run on indemnity claims until settlement or judgment on the underlying claim. *Goosecreek*, 74 S.W.3d at 492.

2. Other Available Claims

If a contract is involved there may be other claims that can be asserted as part of a third party claim. The proposed third party defendant may have arguably breached some sort of contractual obligation it has to the third party plaintiff and perhaps to the plaintiff/owner. Similarly, the proposed third party defendant may have also arguably breached some sort of warranty obligation(s) made to the third party plaintiff and/or owner. Asserting such claims for breach of contract or breach of warranty in the context of a third party claim can be a little more tricky than a simple derivative claim for contribution or indemnity. For starters, the limitations period on such claims does not necessarily run from the time that a third party claimant is held to be liable to the

plaintiff/owner. Limitations may very well run from an earlier date. There could also be other limitations and requirements on bringing a claim for breach of contract or breach of warranty that can present additional issues in the context of a third party claim. Nevertheless, these claims could very much be at issue in a third party action, particularly with respect to subcontractors and subconsultants.

3. Plaintiff's/Owner's Claims May Dictate Third Party Claims

One issue that comes up quite often in the context of third party claims is the ability on the part of the defendant/third party claimant to assert such claims in the litigation in question. A claim for contribution, while the most commonly available and easiest claim to assert, is only available if the plaintiff has brought a claim for negligence against the defendant/third party claimant. There is no contractual contribution in Texas. See *Paragon v. Larco*, 227 S.W.3d 876, 888 (Tex.App.—Dallas 2007, no pet.). Whether a defendant has available to it a claim for contribution is therefore determined by the plaintiff. For instance, a savvy owner may determine that it is in its strategical best interest to elect not to proceed with a claim for negligence against its general contractor. The addition to the litigation of several subcontractors whose work has been called into question by the general contractor significantly slows down the litigation. The additional investigation and discovery that needs to be done as well as coordinating multiple parties and their counsel requires a significant amount of time. This necessarily delays a resolution of the claim for the owner.

Depending on the dynamics and stratigical considerations at issue, it may be to the benefit of the owner to try to prevent the general contractor from bringing other parties to the litigation. One way owners have tried to do that is by bringing only claims for breach of contract. When the general contractor then tries to add subcontractors as third party defendants, the owner argues that there is no claim for contribution and the general contractor cannot bring such claims in the lawsuit. The owner further argues that if the general contractor has

claims against its subcontractors for breaching their subcontracts it can make those on its own in other litigation. In other words, there is no need to bring third party claims and increase the number of parties to the dispute. The owner can and is entitled to look to only its general contractor for relief.

Indeed, this is precisely the strategy that has been employed extensively in the school district litigation that has been going on in the Valley over the last few years. Another facet of this strategic analysis is the recoverability of the owner against the general contractor. Because it is a general contractor, the ability to satisfy a judgment is generally less of a concern to the owner because general contractors typically have more assets than subcontractors. Further, in a post *Lamar Homes* world, the prospect of having no insurance coverage because there is not a claim for negligence is significantly reduced and the fact that the only claims asserted may be ones for breach of contract does not necessarily mean that there has been no defective construction and that there is no insurance available under a general liability policy.

There are a number of different theories that a defendant/third party claimant can pursue in making a third party claim. Some of those may be negligence based simple contribution claims and some may be based on contractual obligations. Some may also be based on statutory provisions providing that some other party is principally responsible for the claim at issue. The most prominent of these, discussed in more detail below, is one for statutory indemnity against manufacturers of products that are incorporated into the construction. The third party claimant must, however, have some sort of theory under which to pursue its third party claim.

III. RESPONSIBLE THIRD PARTIES

In addition asserting a third party claim and actually bringing a third party into the lawsuit as a party, Texas law provides another mechanism for attributing some or all of the liability to a third party. This is accomplished by identifying a party as a “responsible third party.” This

procedure was enacted by the Legislature and incorporated into Texas practice in 1995. Its purpose is to allow party to designate a third party as a “responsible third party” and be able to attribute liability to them and obtain a finding for the responsible third party’s comparative responsibility without actually adding the third party to the lawsuit. Designating a third party as a responsible third party does not bring the third party into the litigation, at least not initially, and therefore provides no help to the defendant/third party claimant in resolving the claim with the plaintiff. However, there are other considerations, some of them strategic, that may lead a party to designate a third party as a responsible third party as opposed to bringing them into the litigation. The third party may have no ability, either practically or legally, to help resolve the claim. The defendant/third party claimant may also determine it is more beneficial to its defense to be able to attribute responsibility to a party that is not there to defend itself (i.e. the empty chair) than to litigate with someone who may very well be pointing the finger back at the third party claimant. Some lawyers refer to the practice of designating responsible third parties as one for trial lawyers and to actually bringing third parties into the litigation as being the practice for settling lawyers.

A. Designating A Responsible Third Party

A third party claimant brings a claim against a responsible third party by moving for leave to designate a party as a responsible third party. Again, the designation of a party as a responsible third party does not bring the third party into the litigation. A party seeking to designate another party as a responsible third party simply moves for leave to do so under Chapter 33 of the Texas Civil Practice & Remedies Code. The motion for leave must plead sufficient facts concerning the alleged responsibility of the person to be designated to satisfy the basic pleading requirements of the Texas Rules of Civil Procedure. Tex. Civ. Prac. & Rem. Code §33.004(g). A party, usually the plaintiff, can object to the motion for leave to designate a responsible third party and must do so on or before the 15th day after the date the motion is served. *Id.* at 33.004(f). The grounds

THIRD PARTY PRACTICE

or basis for objecting, however, are minimal and there typically is not much that a plaintiff or other party who opposes the designation of a responsible third party can do to prevent it. In fact, the statute specifically provides that even if an objection is filed the court shall grant leave unless the objecting party shows that the defendant did not plead sufficient facts concerning the alleged responsibility of the proposed responsible third party and further provides that the defendant gets an opportunity to replead if an objection is filed. *Id.* at 33.004(g). If no objection is filed, the statute provides that the motion for leave to designate a responsible third party is automatically granted. *Id.* at 33.004(f).

The responsible third party does not even have to be a party who is actually liable to the plaintiff for some or all of the plaintiff's damages. In fact the statute defines "responsible third party" as a person "who is alleged to have caused or contributed to cause in any way the harm for which recovery of damages is sought..." *Id.* at 33.001(6). The initial responsible third party statute actually required the joinder of the responsible third party. However, in 2003 the Legislature eliminated the requirement that the responsible third party could have been, but was not sued by the claimant. Act of 2003, 78th Leg., Ch. 204, Sec. 4.03, 4.04, 4.10(2), §33.004 and 33.011. In addition to parties that the plaintiff can sue if they so choose, a defendant may designate as a responsible third party a party that is in bankruptcy, an employer who may be protected from suit by the worker's compensation bar, or a party whom the plaintiff is otherwise prohibited from suing by limitations or for some other reason.

While the prohibitions against parties who can be designated as responsible third parties may be few and the requirements for engaging in this procedure may be minimal, it must be done timely. The statute provides that a party must be designated as a responsible third party 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. Scheduling orders often require the joinder of parties at an

earlier date and some courts have interpreted the "joinder" deadline to include the designation of responsible third parties in addition to traditional third party practice. The two are separate and distinct procedures and in fact the responsible third party statute specifically provides that nothing in that statute effects the third party practice as recognized in other rules and statutes. *Id.* at 33.004(b). Nevertheless, they are often treated together for joinder purposes. Further, courts have been known to hold that a motion for leave to designate a responsible third party is untimely when filed close to the 60 day deadline before a trial date if the litigation has been going on for some time and the identity of the responsible third party and the facts that give rise to their potential responsibility has been known for some time.

On the other hand, one court of appeals recently addressed the designation of parties as responsible third party parties and the timeliness of such a designation and found that it only needed to meet the specific requirements of §33.004(e). That is, so long as it is filed within sixty (60) days of the trial date it is timely. In fact, the facts of this recent case show just how easy it is to use the responsible third party statute to somewhat manipulate the system. *Flack v. Hanke*, ___ S.W.3d ___, 2009 Tex. App. LEXIS 3639 (San Antonio May 27, 2009), involved a business that had gone south financially and the claims arose out of the failure of the business. *Hanke* had been sued for breach of fiduciary duties, negligence, and violations of the DTPA in connection with the sale of his stock of the company. The company, Flack Interiors, Inc., reached a settlement with Hanke but as part of the settlement Hanke agreed to a new trial setting and to designate a couple of law firms as responsible third parties before being dismissed from the case. Flack and Hanke entered into an agreement to amend the scheduling order and extend the deadline to add new parties. Hanke then filed a designation of responsible third parties and obtained an agreed order granting the designation and designating the law firms, Langley & Banack and Cox Smith, as responsible third parties. The plaintiff, Flack, then filed a motion to join the responsible

third parties as defendants and thereafter dismissed Hanke from the suit.

The law firms were none to happy about being brought into the litigation. The litigation against Hanke had been settled with the plaintiff prior to the law firms being brought in as defendants and limitations with respect to plaintiff's claims against the law firms had passed. Nevertheless, the court held that the designation of the law firms was timely and was done properly and the law firms' objections to being brought into the litigation in this manner were overruled. The court specifically found that Hanke was still a defendant when the responsible third party designation was made even though he had agreed to settle the claims. The court noted that nothing in Chapter 33 precludes a party from being both a defendant and a settling person and that the only thing required to invoke the responsible third party statute, §33.004, was that he was a defendant at the time he filed his designation. *Id.* at 14.

One of the law firms had even attempted to object to its designation as a responsible third party, moving to strike that designation. The trial court granted the motion, but the court of appeals reversed it as procedurally improper. The court of appeals noted that §33.004 does not provide any method for a responsible third party to object to its own designation. Only a party can object and move to strike a designation. *Id.* at 21. The law firm could not have filed a motion to strike itself as a responsible third party. By the time it filed the motion to strike it was a party and therefore had standing to move to strike a responsible third party designation. However, once it became a party the law firm was no longer a responsible third party. The court found that this would require the law firm to define itself as both a defendant and a responsible third party at the same time and held that such an interpretation of the statute conflicts with its plain wording and renders it unworkable. *Id.* at 22, citing *Cities of Austin, Dallas, Fort Worth and Hereford v. Southwestern Bell Tele., Co.*, 92 S.W.3d 434, 442 (Tex. 2002).

The Flack case demonstrates how easy it is to designate a party as a responsible third party, how there is nothing a responsible third party can do about being identified as one and being brought into the litigation, and how the parties to a lawsuit can use the procedure to facilitate some things they would not otherwise be able to do. It also demonstrates that a party who has been involved in a project but for whom limitations has already passed on the owner's claims against it is not necessarily clear from liability to the plaintiff.

B. Abrogation of Limitations

One of the significant features of the responsible third party statute is the provision that allows the plaintiff to bring claims directly against the responsible third party if it so chooses. In traditional third party practice, a plaintiff is not prohibited by Rule 38 from bringing a claim directly against the third party defendant and is free to do so as long as that claim is not otherwise prohibited. However, limitations often prohibit a plaintiff from bringing direct claims against a third party defendant, particularly if a significant amount of time has passed between the time that the cause of action accrued and the defendant brings a third party claim. If the third party claim is one for contribution or indemnity, the limitations will not run on the defendant/third party claimant's claim against the third party defendant but the plaintiff may not be able to bring a direct claim against the third party defendant.

What is so unique about the responsible third party statute is that it provides a mechanism for the plaintiff to bring claims directly against the responsible third party even if limitations have already expired on any claims between the plaintiff and the responsible third party. The responsible third party statute specifically provides that 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 as a responsible third party." *Id.* at 33.004(e). In other words, the plaintiff has sixty (60) days,

“the so-called 60 day window,” in which to bring claims directly against a party who has been designated as a responsible third party. As long as the statute is followed and the procedure is complied with, a party designated as a responsible third party has no limitations defense to the owner’s claims even though they may be brought several years after the designated responsible third party performed its work.

The existence of this provision has resulted in the practice, often with the full knowledge of the plaintiff’s counsel, of designating a third party as a responsible third party instead of bringing claims against them as a third party defendant, at least initially. By doing so, the plaintiff can then bring claims directly against the responsible third party if it so chooses. The defendant can then assert any cross-claims it chooses against the party it initially designated as a responsible third party because that party, after the plaintiff brings claims directly against it, is a defendant along with the initial defendant. If for some reason the plaintiff decides not to bring claims directly against the designated responsible third party, the defendant can then bring third party claims against the designated responsible third party if time permits in the event that it wants the third party to actually participate in the litigation and possibly contribute to a resolution. Theoretically, a party could be exposed almost indefinitely to an owner under this procedure. This indefinite exposure, however, was recently addressed by the supreme court.

C. The Statute of Repose

One issue that is not specifically addressed in the responsible third party statute is when this indefinite exposure to claims by the plaintiff ends for a party designated as a responsible third party. §33.004(e) obviously specifically abrogates the statute of limitations for claims against a party designated as a responsible third party. What is not addressed is whether it also abrogates the statute of repose for such claims. §16.008 of the Civil Practice & Remedies Code is a statute of repose for claims against design professionals. Similarly, §16.009 of the Civil Practice & Remedies Code is a statute of repose

for claims against contractors. Both of these statutes of repose essentially provide that a claim for damages with respect to the design or construction of a building must be brought against the design professional or the contractor within 10 years of the construction.

This precise issue was recently addressed by the supreme court in *Galbraith Engineering Consultants, Inc. v. Pochucha*, 290 S.W.3d 863 (Tex. 2009). In that case, Bill Cox Constructors built a house about 8 years before the Pochuchas purchased it. After moving into the new home, the Pochuchas noticed that they had drainage problems and after investigation determined that it was a problem with the french drain system. The Pochuchas sued the builder, Bill Cox, who later filed a motion for leave to designate Galbraith Engineering and Swientek Construction as responsible third parties. Galbraith had designed and inspected the french drain system and Swientek installed it.

The parties specifically followed the provisions of the responsible third party statute. After the trial court approved the designations of Galbraith and Swientek as responsible third parties, the Pochuchas amended their pleadings to join them as defendants and bring claims directly against them. Galbraith thereafter moved for summary judgment based on the statute of repose, claiming that it could not be joined more than 10 years after the completion of the improvement (more than 10 years after construction). The court of appeals, noting that §33.004(e) is part of the overall statutory scheme for apportionment of responsibility under Chapter 33, held that the claim was not foreclosed by the statute of limitations but had instead been revived by §33.004(e). The court of appeals concluded that the revival statute (the 60 day window) applied to both statutes of repose and statutes of limitations. *Id.* at 866.

The supreme court disagreed and held that there is a difference between statutes of repose and statutes of limitation. The court found that limitations provisions begin to run upon the accrual of a cause of action, which can begin long after construction has been completed and depend on when the problem first arises.

Statutes of repose, on the other hand, run “from a specified date without regard to accrual of any cause of action.” *Id.* at 866. The court went on to address the differences between statutes of limitations and statutes of repose, noting that a statute of limitations operates to procedurally bar the enforcement of a right whereas a statute of repose takes away the right altogether, perhaps before the right even accrues. The purpose of the statute of repose is to create a substantive right in the defendant to be free of liability after a specified time or, in other words, to provide “absolute protection to certain parties from the burden of indefinite potential liability.” *Id.* at 866, citing *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003).

The court noted that the Legislature could have provided an extension of the period of repose. The court specifically noted that the Legislature in fact did that in the statute of repose itself, providing that presenting a written claim for damages to an engineer within the 10 year period of repose extends the period for 2 years from the date the claim is presented. *Id.*, citing Tex.Civ.Prac. & Rems. Code §16.008(c). The court then engaged in an analysis of whether the Legislature intended the term “limitations” to be applied narrowly, only applying to statutes of limitations, or to be applied more broadly to include statutes of repose. The court noted that the term has been used in both context(s) and engaged in a standard statutory construction analysis, analyzing the use of the term in §33.004. The court looked at the consequences of construing “limitations” broadly and noted that it would defeat the recognized purpose for statutes of repose, the establishment of a definitive end to the potential for liability unaffected by rules of discovery or accrual. *Id.* at 866. The court noted that “a statute of repose thus represents the Legislature’s considered judgment as to the inadequacy of the traditional statutes of limitations for some types of claims.” *Id.*

The court went on to analyze the purpose of the responsible third party statute and the overall proportionate responsibility scheme. The court noted that the proportionate responsibility scheme is a complex statutory scheme for the

comparative proportionate responsibility among parties in tort actions. Noting that the scheme no longer equated responsibility with liability to the plaintiff or claimant, the court noted that a defendant could designate a responsible third party even though that party possesses a defense to liability or cannot be formally joined as a defendant. The court then noted that “chapter 33...is apparently unconcerned with the substantive defenses of responsible third parties...” *Id.* at 869. Noting that it could find nothing in §33.004 or the proportionate responsibility scheme to convince it that the Legislature intended to revive claims extinguished by a statute of repose and noting the importance of the legislative purpose of the statute of repose, the court refused to find that §33.004(e) revives or extends the statute of repose like it does the statute of limitations. *Id.*

D. When the Plaintiff Is Otherwise Prohibited From Bringing Claim Against the Responsible Third Party

The supreme court’s language in *Pochucha* also helps to address or at least gives an indication of how the court may rule on another issue that has been contested and widely debated concerning § 33.004. That is the designation of parties against whom the court has already ruled the plaintiff cannot recover. As previously noted, the statute does not require that the plaintiff be able to recover against the responsible third party in order for a defendant to be able to designate a party as a responsible third party. The plaintiff may in fact be prohibited from recovering against the responsible third party by the statute of limitations or some other legal doctrine. What if, however, the court has actually ruled on the claims against the third party? One issue that has been the subject of much debate among construction lawyers is whether a party who has already been dismissed from the case by a ruling of the court can be designated as a responsible third party and have a portion of the liability attributed to them in the jury charge. This issue can come up in a variety of different ways and could, and perhaps should, have a different answer depending on the basis on which the proposed responsible third party was dismissed.

The fact that the plaintiff is unable to bring a claim against the third party because it is barred by some legal doctrine may not necessarily speak to the merits of the plaintiff's claim against that party. In fact, the responsible third party statute implicitly recognizes this by noting that the plaintiff does not have to be able to recover against the proposed responsible third party in order for a party to be designated as one. Indeed the original responsible third party statute specifically addressed certain parties against whom the plaintiff might have a claim that was barred by some other legal doctrine. These parties included an employee's employer who would have the protections of the worker's compensation bar and a bankrupt party who has the protections of the bankruptcy code. The supreme court recognized this in *Pochucha* as well. *Galbreith v. Pochucha*, 290 S.W.2d at 869. What about a party, however, for whom the court has already ruled on the substantive merits of the plaintiff's claims against that party by way of a no-evidence motion for summary judgment?

1. Parties Who Have Been Dismissed Based on a Substantive Ruling

Depending on the timing of the ruling on a particular motion, a defendant or group of defendants may have the opportunity to designate as a responsible third party a party that has previously been granted summary judgment by the court. Such a party may include one that has obtained a ruling from the court that there is no evidence that its work contributed in any way to the problem. Take for example a subcontractor who has been brought into the litigation along with a number of other parties. The contribution of the subcontractor's work to the problem may be tenuous at best. The subcontractor proceeds with a no-evidence summary judgment motion and the court grants the motion. If the general contractor still feels like it is possible that a jury could conclude that this particular subcontractor's work was part of the problem should it be able to submit the subcontractor as a responsible third party?

There is nothing in the responsible third party statute that specifically says that a party cannot be designated as a responsible third party

after being a third party defendant or even after being dismissed as such. Since the court in the context of granting a no-evidence summary judgment has already ruled that there is no evidence that the work of the proposed responsible third party contributed to the problem, it would appear that the subcontractor who prevailed on the no-evidence summary judgment motion should not be designated as a third party. In fact, §33.004 actually indirectly addresses this issue, providing a mechanism by which a party can strike the designation of a responsible third party. §33.004(1) provides that a party may, after adequate time for discovery, move to strike a previously designated responsible third party on the grounds that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damages. Such a motion to strike puts the burden on a defendant to produce sufficient evidence to create a genuine issue of fact regarding the designated responsible third party's responsibility. This procedure does not specifically address the situation where a party has been an actual party to the litigation, dismissed by summary judgment, and one of the remaining parties seeks to designate that party as a responsible third party for purposes of submission to the jury. However, §33.004(1) provides a strong argument that the party that has been dismissed on a no-evidence summary judgment should not be submitted as a responsible third party.

2. Parties Who Have Been Dismissed Based on a Legal Doctrine

What about a party, however, who has been dismissed on some other legal doctrine? This issue comes up on a fairly regular basis in construction claims in the context of the economic loss rule. A party whose work is covered by a contract may move for summary judgment on the basis of the economic loss rule, claiming that the only recovery that can be had against it would be one for breach of contract. This can be a particularly thorny issue for parties in a case involving a subsequent purchaser when the party's contract was with the original owner. If the contract was not assigned, there be no party who can assert a claim for breach of contract against that particular party. While that

party may very well have contributed, perhaps significantly, to the overall problem, if it can prevail on its argument that the economic loss rule bars all claims against it none of the other parties may be able to assert claims against it. Contribution claims are arguably barred because they are only available in tort and there are no tort claims against that party. Such a party seems to be precisely the type of party that the responsible third party statute was directed at and their proportionate responsibility should be submitted to the jury even if none of the parties can proceed against them. This is true even if the party was initially a party to the lawsuit and was dismissed by way of summary judgment. The application of the economic loss rule in a context such as this and its appropriateness is of course an entirely different matter and is beyond the subject matter of this paper.

One thing that defendants have been doing more and more of is pleading the designation of a party as a responsible third party in the alternative. Whether it is in addition to a third party action in connection with a third party petition or in connection with a cross-claim against a co-defendant, parties often plead a responsible third party designation in addition to the claims asserted. It seems clear that a party cannot be both a responsible third party and a defendant at the same time. *Flack*, 2009 Tex.App. LEXIS 3639 at 21-22. At the time a third party claim is filed, however, it is not always clear whether the proposed third party defendant is a viable defendant or whether there may be some prohibition of the claims against that party. They might therefore more appropriately be a responsible third party.

Further, parties sometimes disappear prior to the trial of the matter. Of course if the “disappearance” is a result of a settlement with the plaintiffs then the party is a settling defendant and is submitted on the jury charge by way of his status as such. A plaintiff can, however, non-suit a party at any time prior to the trial and may determine that it is beneficial to drop some parties against whom recovery does not appear to be too promising, particularly if there are other viable defendants in the lawsuit. Those parties who have been jettisoned by the

plaintiff by way of a non-suit may very well have significant exposure. The dismissal of the claims against these parties on the eve of trial can make it more difficult to amend pleadings and it makes the most strategical sense to have those parties designated as responsible third parties prior to the deadline – 60 days before trial. As a result, defendants are now asserting this alternative designation in their pleadings. No Texas case has specifically addressed this issue and whether this is an appropriate and sufficient designation of responsible third party. The prudent course of action is to go ahead and make the designation timely and have the court enter an order on the designation. The responsible third party can be a defendant and/or third party defendant, either at that time or become one thereafter, but if the party is no longer around at the time of trial the parties who are left for trial will still have an order designating the party or parties as responsible third parties in the event it becomes necessary.

IV. STATUTORY INDEMNITY FOR PRODUCTS CLAIMS

In addition to the work that is involved in any construction project, the construction also involves the use of materials. Those materials are sometimes found to be defective, either through the provision of shoddy materials or through the application of such materials in a manner that proves to be defective. As a result, the claims that are at issue in a construction defect case sometimes involve not only claims for negligence and breach of contract and/or warranties, but also product defect claims. Naturally, these claims are typically raised by general contractors and/or subcontractors who have used and installed the defective product as part of the construction or perhaps by design professionals who have specified the use of a particular product.

There is of course a body of law that governs product liability claims and that body of law sometimes comes into play in a construction defect case. In addition to the general law governing products liability claims, there is a particular statute in Texas which provides for statutory indemnity against a manufacturer of a product in favor of the seller of that product.

Chapter 82 of the Texas Civil Practices & Remedies Code generally provides that an innocent seller of a product is entitled to recover indemnity from the manufacturer of the product as well as its costs in having to defend against actions involving the defective product. The application of Chapter 82 is relatively straight forward in the context of an innocent retailer. However, in the context of a construction claim when the product is actually installed by a contractor, its application becomes far more complicated.

Typically, a seller of a product is entitled to complete indemnity from the manufacturer of the product under Chapter 82. If the seller is sued, it can tender the claim to the manufacturer for a defense. If the manufacturer refuses or if the seller chooses to go ahead and resolve the claim, the seller can pursue its indemnity claims against the manufacturer after any resolution of the underlying claim. There is a defense for the manufacturer to such a claim if the seller negligently modifies or alters the product in question. When the product is incorporated into a structure as part of a construction project, the application of Chapter 82 becomes a little less clean and a number of questions arise. Is the contractor really a seller? What is the product once the manufactured product is incorporated into the structure? Was the product modified when it was installed? And a host of other questions. Many of these issues are currently being considered by the Texas Supreme Court.

The issue of whether a subcontractor who installed a defective product into a structure as part of its work on a construction project can seek indemnity under Chapter 82 against the product manufacturer is the issue in *Fresh Coat, Inc. v. K-2*, a case currently pending before the Texas Supreme Court. *Fresh Coat* arises out of a group of lawsuits brought by homeowners in a Houston suburb. The principle claim in the suits was that the Exterior Insulation and Finish System (EIFS) installed in the homes was allegedly defective and allowed water intrusion. The homeowners sued the home builder, Life Forms Homes, Inc., the subcontractor that installed the EIFS, Fresh Coat, Inc., and Finestone, the manufacturer of the EIFS,

alleging water penetration, mold growth, and other damages allegedly caused by the EIFS. The homeowners asserted a number of claims relating to the marketing, sale and distribution of the EIFS and alleged that it was a defective product. The builder, Life Forms, filed cross-claims against Fresh Coat and Finestone seeking indemnity. The subcontractor who installed the EIFS, Fresh Coat, asserted a claim for indemnity under Chapter 82 against the manufacturer, Finestone.

The suits brought by the homeowners were ultimately settled by the parties, but the settlement did not resolve the indemnity claims among Life Forms, Fresh Coat and Finestone. The basis for the indemnity claim by Life Forms against Fresh Coat was the standard indemnity agreement found in most subcontracts entered into in the construction industry in Texas whereby the subcontractor agrees to indemnify the builder/general contractor for any claims relating to the work performed by the subcontractor. In order to meet the express negligence rule and be enforceable, the subcontractor agrees to indemnify the general contractor for the general contractor's own negligence. The indemnity claim by the subcontractor, Fresh Coat, against Finestone was of course based on Chapter 82.

The indemnity claim by Life Forms against Fresh Coat was ultimately settled. The Chapter 82 claim for indemnity by Fresh Coat against Finestone was tried to a jury. The jury found in favor of Fresh Coat and against Finestone and awarded Fresh Coat recovery on two different indemnity claims. The first was the claim for damages incurred by Fresh Coat in settling with the homeowners. The second was the claim for damages incurred by Fresh Coat in settling Life Forms' indemnity claim against Fresh Coat, which effectively reimbursed Life Forms for Life Forms' settlement with the homeowners. The court of appeals affirmed the judgment in favor of Fresh Coat for the damages incurred by Fresh Coat in settling the homeowner's claims. However, the court of appeals reversed the award in favor of Fresh Coat on its settlement payment to Life Forms, finding that the indemnity payment to Life Forms fell within the

exception to indemnity under Chapter 82 excluding any duty on the part of the manufacturer to indemnify for a loss caused by the seller's negligence, intentional misconduct, or other act or omission. The supreme court granted the parties' petitions and heard arguments in December of last year.

The issues raised by the parties and the questions that the court appeared to be wrestling with at oral argument are quite interesting. What is the "product" when the product in question is incorporated into a structure, something that may or may not be a product itself? Is the contractor who uses the product as part of his materials supplied on the job and incorporates it into the work he performs on the job a "seller" for purposes of the statute? If so, what has he done, if anything, to alter or modify the product? Does the indemnity agreement make the subcontractor "independently liable" putting it within the exception under Chapter 82 and causing the subcontractor to lose any indemnity rights under the statute? Should products liability claims under Chapter 82 even apply in the residential construction context? These and other questions were all touched on in some way or another by the party's briefing, at oral argument, and/or by commentators who have been following this issue currently before the supreme court.

The principle basis on which the court of appeals reversed the award in favor of Fresh Coat and denied its claim for indemnity against Finestone was based on the indemnity agreement Fresh Coat had with Life Forms. The indemnity provision is the standard indemnity agreement in virtually every subcontract that is entered into on construction projects in Texas. As is often said, and as one of the party's even argued before the supreme court, it is hard to find a subcontract in Texas that does not have such an indemnity agreement in it. Such risk transfer provisions are ever-present in construction in Texas and a subcontractor essentially has no choice but to agree to such an indemnity agreement. They cannot get much work if they do not agree to indemnify the general contractor for claims relating to work to be performed under the subcontract.

Despite the rather generic nature of the indemnity provision in the subcontract agreement, the court of appeals' decision, reversing the award in favor of Fresh Coat under Chapter 82 for the amounts that Fresh Coat paid to Life Forms under the terms of the indemnity agreement between those two parties, made much of that indemnity agreement. It was this indemnity agreement that, in the eyes of the court of appeals, made Fresh Coat "independently liable" and triggered the exception to indemnity under Chapter 82. That exception relieves a manufacturer from its obligation to indemnify the seller when the loss is caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product. Tex.Civ.Prac. & Rem. Code §82.002(a). The seller is independently liable for any loss caused by its own actions. The court of appeals essentially held that Fresh Coat's promise in its subcontract with Life Forms to indemnify Life Forms for claims arising out of the work performed by Fresh Coat created independent liability on the part of Fresh Coat for which Fresh Coat should not be able to recover statutory indemnity under Chapter 82.

The court of appeals interpreted the situation as one in which Fresh Coat had bargained for and accepted liability that is not that of an ordinary seller of a product. Finestone aggressively argues this point in the supreme court. Finestone emphasizes the absence of privity between the builder, in this case Life Forms, and Finestone and notes that Fresh Coat in essence accepted Life Forms' independent liability for negligently constructing the homes as part of the bargain struck between Fresh Coat and Life Forms. Finestone claims that it should not have to accept the liability of some other party who is certainly a stranger to any transaction between Finestone and its customer Fresh Coat (the seller) and is actually not even in the chain of distribution of its product. The essence of its argument is that Finestone may have agreed to accept the liability of its sellers for wherever its sellers might get sued for so long as the seller does not alter or modify the product, but that Finestone should not be subjected to liability for contractual indemnity

agreements that its sellers enter into with third parties. Finestone argues that its sellers should not be able to shift their contractual indemnity agreements to Finestone under Chapter 82.

In response to Finestone's assertions, Fresh Coat notes and argues that it did not intentionally waive its statutory indemnity rights. The subcontract that it entered into with Life Forms is completely silent on the issue of Chapter 82 indemnity rights. It only speaks to Fresh Coat's obligation to indemnify Life Forms. Fresh Coat notes that the exception to a manufacturer's indemnity duties under Chapter 82 turns on the seller's fault in modifying or altering the product and not on a seller's contract with a party who is effectively another seller. Fresh Coat further points out that for a manufacturer to invoke the exception, the "loss" to the claimants must have been caused by the seller. In the case of Fresh Coat indemnifying Life Forms for Life Forms obligations to the seller, the "loss" is not caused by the seller, or at least the seller who is seeking indemnity under Chapter 82 (i.e. Fresh Coat). Fresh Coat argues that it is precisely the type of innocent seller that Chapter 82 is designed to protect and claims that Finestone is attempting to significantly broaden the scope of the exception to encompass issues it was not to designed to reach.

Another issue that the parties argued and the supreme court has wrestled with is whether Fresh Coat is actually a "seller" sufficient to qualify for making a claim for indemnity under the statute. Noting that Fresh Coat did not sell homes or even parts of homes, Finestone argues that Fresh Coat really only contracted for services with the homebuilder. Finestone argues that the "sales" of products by Fresh Coat is merely incidental to their work and as such is not the type of sales that the statute was designed to address. The EIFS installed by Fresh Coat actually involves buckets of adhesive coat and a roll of mesh that are obtained by Fresh Coat, through a distributor, from Finestone and installed by Fresh Coat on the home. The process even requires that Fresh Coat obtain some other components of the EIFS product from third party vendors. Fresh Coat mixes it all together to create the exterior wall of

the house or EIFS. In making its point, Finestone even tried to argue that because the EIFS becomes an integral and inseparable part of the house that the EIFS itself is not even a "product." The court of appeals rejected this argument, noting that component parts can be products as well, and this argument does not appear to have gained much further traction in the supreme court.

The remaining argument centers on whether EIFS itself is actually a product. Both sides cite and argue cases in which courts have held, or at least the opinions could be read that the courts have held, that a portion of the construction can be a product and other cases that have held it cannot. *Barham v. Turner Construction Co. of Tx.*, 803 S.W.2d 731 (Tex.App.—Dallas 1990, writ denied) (general contractor held to be in the business of selling its services and component parts – in this case steel columns – could not be considered a product sold by the general contractor); *R.H. Tamlyn & Sons, LP v. Scholl Forest Indus., Inc.*, 208 S.W.3d 85 (Tex.App.—Houston [14th Dist.] 2006, no pet.) (products liability case in which both EIFS and window flashing were treated as products). Fresh Coat also points out that EIFS has been addressed in a number of other Texas cases in other contexts and treated as a product, particularly in coverage cases, most notably the Lamar Homes case. *Lamar, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1, 16-20 (Tex. 2007) (declaratory judgment action where the court treats EIFS as a product; see also, *Pugh v. General Tiseo Supplies, Inc.*, 243 S.W.3d 84, 93-95 (Tex.App.—Houston [1st Dist.] 2007, no pet.) Both parties cite numerous cases from other jurisdictions treating component parts of structures as products or not as products.

Fresh Coat seems to have the better end of this argument, as the majority of case law is relatively clear that a component part of a larger product is a "product" for purposes of Chapter 82 and material used in a house can be a product as well. There is, however, law in other contexts that makes the house itself is not a "product." A home is often considered real property and not a product. See, *Keck v. Dryvit Sys.*, 830 So.2d 1, 6 (Ala. 2002). In fact, Finestone's counsel

suggested to the court at oral argument that the best course of action would be to hold that a house is not a product and anything incorporated into the structure of the house is not a product. His contention was that Chapter 82 should never be applied in a residential construction context. In support of this contention, he has noted that the general contractor under the RCLA is only liable for its own negligence. Consequently, Finestone's counsel concludes that there is not need for the indemnity provisions under Chapter 82 in a residential construction claim.

There are obviously a number of arguments to be made concerning the application of a statutory indemnity claim against a manufacturer in a construction defect case. There are a number of issues in a construction defect case

that are not present in a typical products liability action. Nevertheless, the cause of the problem resulting in a construction defect claim is often a product. In the case of EIFS, that certainly seemed to be the case. It will be interesting to see how the supreme court rules in the Fresh Coat case and how many questions and issues the court's ultimate ruling actually resolves.

V. CONCLUSION

Third party practice involves a myriad of issues. It is a vital part of construction defect litigation but it can present many challenges. There are almost always strategical decisions that are involved as well. The law in this area is constantly evolving and will likely to continue to do so as long as construction continues to be performed by multiple parties.