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SETTLEMENT CREDITS

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I. *Application of Chapter 33 Is Mandatory Where a Non-Settling Defendant Proves the Existence and Amount of Settlement within Its Coverage; the Claimant Has the Burden to Show that All or Part of the Settlement Should Not Be Credited*

Chapter 33 of the Texas Civil Practice and Remedies Code “applies to: (1) any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought; or (2) any action brought under the Deceptive Trade Practices-Consumer Protection Act . . . in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.” TEX. CIV. PRAC. & REM. CODE § 33.002(a). Application of chapter 33’s settlement credit to cases within its scope is mandatory. *Carl J. Battaglia, M.D., P.A. v. Alexander*, 177 S.W.3d 893, 906 (Tex. 2005) (“Section 33.012 . . . tells us that credit must be given for settlements.”).¹

¹ Section 33.003 mandates the jury’s determination of the percentage of responsibility for each settling person, so long as there is evidence to support submission. TEX. CIV. PRAC. & REM. CODE § 33.003(a) (“The trier of fact, as to each cause of action asserted, *shall* determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person’s causing or contributing to cause in any way the harm for which recovery of damages is sought. . . (3) each settling person.”) (emphasis added); TEX. CIV. PRAC. & REM. CODE § 311.016(2) (the term “shall” imposes a duty); TEX. CIV. PRAC. & REM. CODE § 33.003(b) (“This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.”).

The Texarkana Court of Appeals recently held that a finding of responsibility on the part of the settling person is not a prerequisite to application of the settlement credit. *Duffey v. Sleep Ctr. of Longview*, ___ S.W.3d ___, 2020 WL 1036438, **3-4 (Tex. App. – Texarkana, Mar. 4, 2020, no pet.) (distinguishing cases seeming to hold otherwise), *citing Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 106-07 (Tex. 2018). Nevertheless, the percentage of responsibility assigned to a settling person can be relevant if the case involves a health care liability claim under chapter 74 and the defendant has elected to reduce the claimant’s recovery by a percentage equal to each settling person’s responsibility as found by the trier of fact. TEX. CIV. PRAC. & REM. CODE § 33.012(c)(2). Otherwise, a defendant can still benefit from submitting a settling person’s responsibility by: (1) the potential reduction in liability assigned to the non-settling defendant; (2) potential avoidance of joint and several liability; and (3) potential limitation on the amount of the award for which the non-settling defendant is liable under section 33.013.

Chapter 33 “does not apply to: (1) an action to collect workers’ compensation benefits under the workers’ compensation laws of this state . . . or actions against an employer for exemplary damages arising out of the death of an employee; (2) a claim for exemplary damages included in an action to which this chapter otherwise applies; or (3) a cause of action for damages arising from the manufacture of methamphetamine as described by chapter 99.” TEX. CIV. PRAC. & REM. CODE § 33.002(c).

Even where chapter 33 does not apply, a party may be entitled to a settlement credit under the common law’s one-satisfaction rule. *Mendez*, 555 S.W.3d at 106-07. This paper focuses on settlement credits under chapter 33. That said, the underpinning of Chapter 33 is the one-satisfaction rule. *In re Xerox Corp.*, 555 S.W.3d 518, 523 (Tex. 2018) (orig. proceeding) (“Chapter 33’s proportionate-responsibility scheme . . . incorporates the one-satisfaction rule.”); *see also Stewart Title Guar. Co. v. Sterling*, 822 S.W.3d 1, 7 (Tex. 1991) (“The one satisfaction rule applies to prevent a plaintiff from obtaining more than one recover for the same injury.”).

Important provisions for purposes of calculating and applying the appropriate settlement credit are contained in section 33.012 – which governs a claimant’s amount of recovery – and section 33.013 – which governs a defendant’s amount of liability. TEX. CIV. PRAC. & REM. CODE §§ 33.012, 33.013. Those provisions use key words, like “claimant,” “defendant,” “liable defendant,” “settling person,” and “percentage of responsibility” – all of which are defined in section 33.011. TEX. CIV. PRAC. & REM. CODE § 33.011(1), (2), (3), (4), (5).

Whether the defendant is entitled to credit one or more settlements is a legal determination reviewed *de novo*. *Sky View*, 555 S.W.3d at 109 n.8 (addressing burden under common law). Similarly, questions of statutory construction are reviewed *de novo*. *Pedernal Energy, LLC v. Bruington Eng’g, Ltd.*, 536 S.W.3d 487, 491 (Tex. 2017). Whether a more deferential standard applies to questions involving the presentation of conflicting evidence remains unresolved. *Sky View*, 555 S.W.3d at 109 n.8.

A non-settling defendant has the burden to prove the existence and amount of a settlement credit, which it may do by placing the settlement agreement or some other evidence of the settlement amount in the record. *Utts v. Short*, 81 S.W.3d 822, 828 (Tex. 2002); *Virlar v. Peunte*, ___ S.W.3d ___, 2020 WL 557735, *22 (Tex. App. – San Antonio, Feb. 5, 2020, no pet. h.) (en banc) (where defense counsel informed the trial court of the amount of

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