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Evidence and Discovery Strategies in Responsible Third Party Practice

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INTRODUCTION

Texas’s “Responsible Third Party” (“RTP”) rule is ironically named because the rule permits defendants to increase the cast of characters in a lawsuit so dramatically that, at the end of the day, no actual *party* may be held *responsible* for anything. Litigators must consider the implications of RTP practice—and in particular the RTP jury charge—from the very beginning of the case.

Obtaining discovery and presenting evidence on the responsibility of these non-party RTPs is critical; in fact, few procedural issues matter more. When a plaintiff does not consider how RTPs will change the apportionment of responsibility, he runs a real risk of prevailing at trial but taking little or nothing in the final judgment. When a defendant does not consider how RTPs will change the apportionment of responsibility, he runs a real risk of being ordered to pay more than he should, or worse, finding himself on the wrong end of a joint and several liability judgment.

A SUMMARY OF TEXAS’S RTP SCHEME

An RTP is any person who is alleged to have caused (or to have contributed to causing), in any way, the harm for which recovery of damages is sought.² Defendants may designate RTPs in lawsuits arising out of tort claims and certain statutory violations, including the Deceptive Trade Practices—Consumer Protection Act.³

A defendant can designate *anybody* as an RTP, including John/Jane Does,⁴ criminals,⁵ bankrupt persons,⁶ employers who subscribe to the Texas workers’ compensation scheme,⁷

¹ Special thanks and credit goes to Credence Fogo Sol, who co-authored the original version of this article and to Stacy Rogers Sharp who has contributed a great deal to its evolution.

² TEX. CIV. PRAC. & REM. CODE §§ 33.004, 33.011. The early history of Texas’s RTP law, which the Legislature originally passed in 1995 as part of “tort reform,” is set forth in Jas Brar, *Comment: Friend or Foe? Responsible Third Parties and Leading Questions*, 60 BAYLOR L. REV. 261 (Winter 2008) (addressing “the unsettled issue of which party should be permitted to ask leading questions to a responsible third party”).

³ TEX. CIV. PRAC. & REM. CODE § 33.002(a).

⁴ TEX. CIV. PRAC. & REM. CODE § 33.004(k).

⁵ TEX. CIV. PRAC. & REM. CODE § 33.004(j).

⁶ David W. Holman, *Responsible Third Parties*, 46 S. TEX. L. REV. 869, 886 (2005).

and even parties over whom the court has no jurisdiction.⁸ For example, lawyers defending malpractice claims may include underlying tortfeasors as RTPs.⁹ While the Texas Supreme Court chose not to address the issue head on, the Fourteenth District Court of Appeals in Houston held that a personal-injury defendant could designate emergency-room or other physicians who contributed to the harm alleged.¹⁰ And parents may be RTPs even though parental immunity would prevent their joinder as defendants.¹¹ Recently, when the Army was a proper RTP, the Texas Supreme Court dismissed the plaintiff's claim in its entirety as a non-justiciable political question.¹²

Under current law:

- (1) A defendant must designate an RTP by filing a motion for leave to designate not later than 60 days before trial,¹³ or if the RTP is an unknown criminal, 60 days after filing its answer.¹⁴

⁷ *Id.*, at 885. That said, a subscribing employer designated as an RTP “retains immunity under the workers’ compensation law.” Elaine Grafton Carlson, *Responsible Third Party Practice*, MCDONALD & CARLSON TEXAS CIVIL PRACTICE § 5.78 (2d. ed.) (2015), n.17.

⁸ Carlson, *supra* n.7; see also 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 Legislative History of Texas H.B. 4: The Medical Malpractice & Tort Reform Act of 2003, at 1304 (2003) (testimony of Michael Gallagher, representing the Texas Trial Lawyers Association) (RTP law, as amended in 2003, permits defendants to submit as RTPs “bankrupt defendants, foreign defendants, unknown defendants, unidentified defendants, phantom vehicles, subcontractors . . . whose names can’t be remembered”), cited in Holman, *supra* n.6, at 884; see also *Dhaliwal v. Vanguard Pharm. Mach., Inc.*, No. 08-2452, 2010 WL 231755 *2 (S.D. Tex. Jan. 20, 2010) (permitting designation of foreign manufacturer as RTP notwithstanding that it probably would not be subject to court’s jurisdiction).

⁹ *In re Smith*, 366 S.W.3d 282 (Tex. App.—Dallas 2012, orig. proceeding).

¹⁰ *ExxonMobil Corp. v. Pagayon*, 467 S.W.3d 36 (Tex. App.—Hous. [14th Dist.] 2015, *rev’d in part on other grounds* at 536 S.W.3d 499, 503 (Tex. 2017).

¹¹ *Hernandez v. Bumbo (Pty.) Ltd.*, No. 3:12-cv-1213-M, 2014 WL 924238 (N.D. Tex. 2014).

¹² *American K-9 Detection Servs., LLC v. Freeman*, 2018 WL 3207134 *8 (Tex. June 29, 2018) (“If this case were to proceed, the fact-finder would be required to determine the degree to which the Army was responsible for Freeman’s injury. This inquiry would require a reexamination of Army decisions, contrary to *Baker’s* first factor.”)

¹³ TEX. CIV. PRAC. & REM. CODE § 33.004; Troy Ford, *Third Party Designation of Responsibility: Avoiding the Pitfalls*, 24TH ANNUAL ADVANCED EVIDENCE AND DISCOVERY COURSE (State Bar of Texas, pub.).

¹⁴ TEX. CIV. PRAC. & REM. CODE § 33.004(j). Unlike the “60 days before trial” deadline that applies to most RTPs, if a defendant wishes to designate an unknown criminal, it is required to do so by 60 days after **filing the answer**. See *In re Unitec Elevator Servs. Co.*, 178 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding), cited in Ford, *supra* n.13; accord *Phi Van Cao v. Hardy*, 352 S.W.3d 218, 222 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

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