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### Navigating the Settlement Offset Provision of the Texas Proportionate Responsibility Statute

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Construction lawsuits almost always involve circumstances in which there are several active defendants as well as several potential or former defendants who have already settled with plaintiff. Additionally, these lawsuits tend to involve crisscrossing allegations of fault among litigants, settling parties, and nonsettling responsible third parties. Thus, construction lawsuits provide fertile ground for the application of a state's apportionment law to take effect and divvy up responsibility for plaintiff's alleged damages.

The law on apportionment in Texas is codified in Chapter 33 of the Texas Civil Practice & Remedies Code in what is known as the Texas Proportionate Responsibility Statute. The Texas Proportionate Responsibility Statute applies to "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." TEX.CIV.PRAC. & REM. CODE § 33.002(a)(1). Given the complexity of this multi-provision statute, along with recent amendments to the statutory framework during the last twenty years in Texas, it is not immediately apparent how the statute may operate mechanically and what the statute's overall effect will be on a plaintiff's dollar sum recovery or an individual defendant's dollar sum liability as it pertains to settlement offsets. This article explores the mechanics of the Texas Proportionate Responsibility Statute through a typical construction case fact pattern in an attempt to explain how the most recently amended version of the statute might affect a lawsuit from the standpoint of one of the numerous subcontractor defendants.

The law as it pertains to settlement offsets has been amended several times in the past twenty years as the Texas Legislature has wrestled with how to best credit non-settling defendants for settlement payments made to plaintiffs by other alleged tortfeasors. In 2005, the Texas Legislature made its most recent changes to Article 33 when it did away with the statutory scheme in which defendants would make a pre-trial election between offsetting the plaintiff's recovery by a dollar amount of settlement payments received or by reducing the plaintiff's award by the percentage of fault attributable to a settling party for actions not involving health care liability. Now, without the former election framework in place, construction law practitioners may wonder how the statute operates to account for settlements received by plaintiffs.

The current version of the statute contains two applicable sections: Section 33.012 reduces the plaintiff's award to account for plaintiff's own negligence and settlements received by plaintiff; and Section 33.013 limits the overall recovery which can be had against each defendant based on that defendant's percentage of fault. But how do these two provisions interrelate and interact with one another? At first blush, it is not apparent whether the limit on plaintiff's recovery, or the limit on defendant's liability, or both, would apply for apportionment in a construction case. And if both are applicable, which reduction would be made first? Notably, the Texas Supreme Court has rejected the notion that both provisions operate cumulatively to reduce a plaintiff's ultimate recovery. See [Roberts v. Williamson, 111 S.W.3d 113, 123 \(Tex.2003\)](#) (rejecting defendant's argument that plaintiff's recovery should be first reduced pursuant to Section 33.012, and then, further reduced pursuant to Section 33.013 by taking the defendant's percentage of responsibility from plaintiff's total maximum recovery under Section 33.012). Rather, Section 33.012 generally places a ceiling on the *plaintiff's maximum recovery*, and requires the plaintiff's total recovery be reduced by any settlement amounts while Section 33.013 places a ceiling on an individual *defendant's maximum liability*. The Texas Supreme Court has explained that, "although related, the two sections pose separate inquiries." [Roberts, 111 S.W.3d at 123 \(Tex.2003\)](#). See also [Carl J. Battaglia M.D., P.A. v. Alexander, 177 S.W.3d 893, 906 \(Tex.2005\)](#); [Pilgrim's Pride Corp. v. Cernat, 205 S.W.3d 110, 118-19 \(Tex.App.-Texarkana 2006\)](#); [Hudspeth v. Enter. Life Ins. Co., 358 S.W.3d 373, 384 FN 3 \(Tex.App.-Houston\[1st Dist.\] 2011\)](#).

To demonstrate how this works using numbers, consider the following hypothetical: Plaintiff, a school district, sues the general contractor and architect alleging damages caused by the negligent construction of an elementary school. The architect settles with the school district for \$50,000. The general contractor, on the other hand, files a third party petition against one of the subcontractors it hired on the job. Following trial, the jury determines that the school district plaintiff suffered \$1M in damages with fault apportioned at 20% to plaintiff for failure to maintain the premises, 5% to the settling architect for negligent design, 25% to the general contractor for negligent supervision, and 50% to the subcontractor for negligent installation.

Party	Percentage Responsibility	Settlement Amounts Paid	Portion of Jury Award
Plaintiff School District	20%		
Architect	5%	\$50,000	
General Contractor	25%		\$250,000
Subcontractor	50%		<b>\$500,000</b>

To determine the subcontractor's actual dollar share of the award according to the rule set forth by *Roberts v. Williamson*, a two-step process should be employed. First, under Section 33.012 plaintiff's total damages are reduced by the 20% responsibility attributed to it and the \$50,000 received in settlement to make the total recovery by plaintiff capped at \$750,000 [ $\$1M - \$200k$  (20% of  $\$1M$ ) -  $\$50k = \$750,000$ ]. Next, the maximum liability for subcontractor would be calculated under Section 33.013 by multiplying subcontractor's percentage liability (50%) by plaintiff's total damages ( $\$1M$ ) to arrive at the product of  $\$500,000$ . Since  $\$500,000$  is lower than the number representing plaintiff's total damages ( $\$750,000$ ),  $\$500,000$  is the number that would be subcontractor's total portion of the award.

Suppose, on the other hand, that the facts of the above example were the same except that along with the architect's  $\$50,000$  settlement, general contractor had also settled with plaintiff before trial for an amount of  $\$300,000$ .

Party	Percentage Responsibility	Settlement Amounts Paid	Portion of Jury Award
Plaintiff School District	20%		
Architect	5%	\$50,000	
General Contractor	25%	\$300,000	
Subcontractor	50%		<b>\$450,000</b>

In this scenario, the two-step process outlined above would leave you with a maximum total recovery for plaintiff at  $\$450,000$  [ $\$1M - \$200k$  (20% of  $\$1M$ ) -  $\$50k - \$300k = \$450,000$ ] and a maximum liability for subcontractor at  $\$500,000$  [50% of  $\$1M = \$500,000$ ]. Since  $\$450,000$  is the lower number in that example,  $\$450,000$  would be subcontractor's total portion of the award.

The application of this framework also varies depending on the number of remaining active defendants at trial. If plaintiff's maximum recovery is exceeded by the total maximum liability of all remaining defendants, the remaining defendant's share of the liability is determined by its *pro rata* share of plaintiff's maximum recovery. Suppose the same facts as the first example except that architect settled for  $\$200,000$  rather than  $\$50,000$ .

Party	Percentage Responsibility	Settlement Amounts Paid	Portion of Jury Award
Plaintiff School District	20%		
Architect	5%	\$200,000	
General Contractor	25%		\$200,000
Subcontractor	50%		<b>\$400,000</b>

In this scenario, application of Sections 33.012 and 33.013 would leave you with a  $\$600,000$  maximum recovery for plaintiff [ $\$1M - \$200k$  (20% of  $\$1M$ ) -  $\$200k = \$600k$ ] with a  $\$250,000$  cap for general contractor's total liability [25% of  $\$1M = \$250,000$ ] and a  $\$500,000$  cap for subcontractor's liability [50% of  $\$1M = \$500,000$ ] for a total of  $\$750,000$  for all remaining defendant's liability. Thus, subcontractor's and general contractor's dollar amount of the award would be determined by their *pro rata* share of the  $\$600,000$  maximum recovery by plaintiff, since  $\$600,000$  is less than  $\$750,000$ . In the end, subcontractor would owe  $\$400,000$  for its *pro rata* share and general contractor would owe  $\$200,000$ .

As these examples demonstrate, even when the total amount of damages suffered by plaintiff and the apportionment of fault among the parties and nonparties remain the same, subcontractor's ultimate dollar amount responsibility can vary substantially depending on other parties' settlements. For these reasons, practitioners should pay close attention in construction cases to ensure that settlement amounts are being fully disclosed.

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